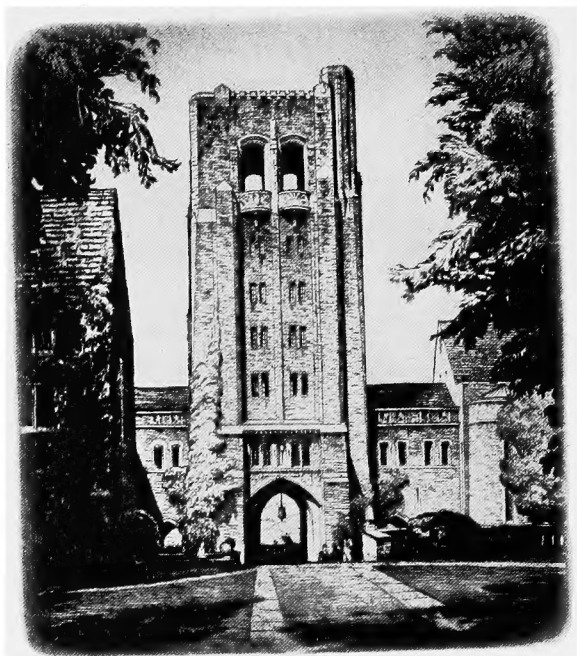


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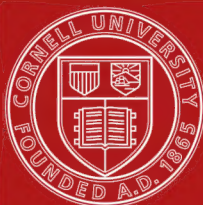
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COMMENTARIES

ON THE

LAW OF CONTRACTS

UPON A

NEW AND CONDENSED METHOD.

BY

JOEL PRENTISS BISHOP, LL.D.

A New Work,

SUPERSEDING THE AUTHOR'S SMALLER ONE.

CHICAGO:

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PREFATORY EXPLANATIONS.

THE endeavor in this volume has been to group, set in order, and illustrate the entire elementary doctrines of the Law of Contracts, in such manner as to render obvious their application in practice, and indicate the true rule where opinions differ. The compressing of all into one volume, contrary to what has heretofore been deemed possible, is effected by a combination of means; such as the omission of useless words and phrases, the selection of short forms of expression where equally perspicuous and complete in meaning with the longer ones, the reduction of the repetitions to the smallest limits consistent with clearness; and, in its several expositions, the bringing forward, not of all the illustrations of doctrines which the books contain, but simply of such and so many as will render them and their applications plain. Presenting the law in its orderly sequences, and divested of superfluities, — beginning at the beginning of its subject, and conducting the reader upward by graded steps to its close, — keeping constantly before his sight the reason for the particular thing in hand, — it asks of the profession to be admitted to the now vacant place of a thoroughly satisfactory book for the student's first reading, for the practitioner's often-repeated rereading, and for first consultation in practice whenever a question under its title arises. Especially it claims that, by reason of its peculiar structure, while thus it teaches what it professes to, it prepares the reader to enter intelligently into any further examinations which he has occasion

for, in the other treatises, the statutes, the digests, and the decisions, the last of which it largely cites. Differing, therefore, widely from the other books on contracts, the author craves attention to fuller explanations of it here than are commonly deemed necessary in a preface.

In 1878, a smaller work of mine was published, entitled "The Doctrines of the Law of Contracts, in their principal Outlines, stated, illustrated, and condensed." It was well received by the profession, a good deal used in practice, and adopted as a text-book in various law-schools. Being electrotyped, it was always in print, and many impressions were manufactured from the plates. The preface states: —

"I have travelled through the adjudged cases, collected the leading doctrines, and arranged from them what I deemed to be a skeleton of the law of the subject, put with it so much of flesh in the form of illustrations as seemed imperative, and draped the whole with as thin a gauze of needless words as I deemed the public taste would bear. My object has been to present the body of the law of contracts, without its bloat, in form to be examined and re-examined, by old and young, the learned and the unlearned, — the student, the practising lawyer, the judge, the man of business, — as any skeleton is, by all classes of inquirers."

In most respects, this work satisfied me, as far as it went. But, on reflection, I deemed that its sphere might be most profitably enlarged. So I have extended its scope, — adding topics, collecting omitted doctrines, and somewhat increasing the illustrations, — have changed in a measure the arrangement; and, above all, have made more prominent the reasons of the law, constituting as they do the law itself. And otherwise I have rendered the book new. In expression equally concise, its former bulk is now more than doubled. Leaving, therefore, the old book, I proceed with the elucidations of the new.

First. *Brevity of Expression.* — Those who have observed the early English statutes, and such works as Littleton's Tenures, are aware that there was a time when lawyers

wrote concisely. But afterward all the floodgates of verbiage were opened into their pens. The idea captured and ruled the profession, that prolix language was in the law the equivalent of precise and profound thought, so that only by pyramids on pyramids of words could legal doctrine be fitly enunciated. Gradually and imperfectly, in later periods, this idea has been modified; being now neither on the one hand what it was, nor on the other hand what it should be, yet just how it lies in the mind of the average lawyer no one can say. In 1856, the first volume of the first edition of my "Criminal Law" was published; it was specially concise in language, compact, and containing an immense mass of legal doctrine. But it was so grievously misrepresented and falsified by reason largely of its brevity of expression, that, not having established a reputation, I felt compelled to expand it in the second edition, not as many of our books are, but by much over a hundred pages, — the only departure from my own judgment which clamor ever succeeded in extorting from me. And I continued this moderately expanded form of writing until the Criminal Law Series was, with the exception of "Directions and Forms," completed. Finally, being unwilling to die with the books so, and greatly needing space for accumulated material, by immense labor, even approaching that of writing new books, I condensed all. But, while thus I improved them greatly for practical use, and rendered them more attractive to any enlightened generation which in the future may choose to look into them, not certainly did I much enhance their present reputation, absolutely not to any degree commensurate with their augmented usefulness. For the condensations of the present work, which have reduced to one volume what otherwise would have required two or more, I have no fear; because, however they may be regarded by the majority, there are now enough lawyers who appreciate this sort of writing, and are willing to be saved money in buying, and labor in reading, to insure

me reasonable success at first, and the errors of to-day are corrected by the light of to-morrow.

Prolixity of expression does not give clearness, as many deem, but it obscures. Nor does it enhance precision; it oftener produces vagueness and uncertainty. And, as it largely appears in our law books, it increases their bulk greatly beyond what those who have not looked into the question imagine. For example, in writing § 426 of this volume, I commenced: "Said Lord Ellenborough, 'The same sense is to be put upon the words of a contract in an instrument under seal as would be put upon the same words in any instrument not under seal.'" Having proceeded thus far, I discovered that, desirous as I was of being able to boast, as some authors do, of having set down the doctrine "in the very words of the learned judges," I must either stop this sort of doing, or have two or three volumes instead of one. So I erased, then wrote: "Words signify the same in sealed and unsealed contracts." Is this sentence obscure? Does it lack precision? Is it not as lucid, as exact, and as complete in meaning as that of "the learned judge"? Yet it is in nine words, and "the very words" are thirty-two. On which basis of calculation, had I written the present book on the prolix plan, not only should I have saved half the labor, but should have secured to myself three and a half times the copyright money which this doubling of it will bring me. Beyond this, I should have compelled my patrons, if they would derive the same benefit, to buy three and a half volumes instead of one, and devote to them a large percentage more of their time. If herein I have wronged my professional brethren, I am now ready to stand up and receive their reprimand. Doubtless there are lawyers who will shut their eyes, bandage their ears, and thrust into a mist their brains, then refuse to look, hear, or think; and, taking this book in their hands, and balancing it for its avoirdupois, propound: "This work is too much condensed, the author has mistaken

his functions, the box is not big enough to hold the substance of ten thousand six hundred and thirty cases, let him learn wisdom of me!" My answer is, that I have not written for men of this class, but for those who look, see, hear, examine, and think.

Secondly. *Avoiding Repetitions.*—No writing absolutely without repetitions could be lucid. But the practice of the law has created as to them a style which, however necessary and to be commended in an argument to the court, or especially to a jury, is unfit for any printed book. The oral address vanishes as fast as it is uttered; and it is often the highest art in the speaker to repeat without seeming to, and still repeat, with varying phrase and fresh illustrations, the same idea, until it bores and wears away its path into the hearer's understanding. Without the skill to do this, and the ever-present perception of its necessity, no advocate ever did or ever will achieve any high success. The advocate's duty pertains to the moment, and it is discharged only when he carries his hearers with him. But the legal author is required simply to present truth accurately and clearly; it is not his fault if a reader, not understanding at the first perusal what is intrinsically plain, refuses to reread; or if, after reading, he closes his mind and locks his understanding against conviction. And every man competent to be a legal author knows that, however lucid and just his expositions are, if involving anything contrary to the preconceptions of his readers, they will in nine instances out of ten treat them in this way; except when stimulated by the exigencies of a cause, for use in which the reading takes place. For these reasons, I have striven in this book, by devices in the arrangement of it as a whole and in its minuter parts, and by other means which need not be specified, I trust with success, to reduce the repetitions to the minimum of what is consistent with perspicuity; beyond which, no condensation in any law writing is justifiable.

Thirdly. *The Legal Doctrine.* — There are those who deem legal doctrine to be a myth, like the mermaid and the sea-serpent. When it is pointed out to them, they can no more discern it than can other men the raven-haired maid or his immense snakeship. For this they do not deserve reproach; it comes from an original defect in their mental makeup, not altogether dissimilar to the incapacity to distinguish colors or the notes of music. Between persons of this class and those whose perceptions of legal doctrine are absolutely far-reaching and distinct, the diversified minds of men are of every imaginable grade; each one simply agreeing with the others that nothing which is not seen by “me” exists. One can derive, from a judicial decision compelling a defendant to pay for his two-dollar shoes, the *doctrine* that purchasers must pay also for their five-dollar boots; while here his vision terminates, nothing further away being visible to him. Another may be able to deduce from these two propositions a third; namely, that men of inherited fortunes, or even that all men, are legally obligated to make remuneration for whatever others furnish them, at their request, to eat, drink, or wear. Another can extend his mental vision a little further, and another further still; but, for all, there is an outer verge where the horizon closes upon their sight, and nothing is discerned beyond. Prominent among the causes which create differences and obscurities in judicial doctrine, is the shorter and longer mental vision of the different practitioners and judges. In the elucidations of this volume, I have endeavored to take into the contemplation what may be termed the human horizon, or utmost reach of the ordinary judicial vision, in distinction from the diversified narrower horizons which bound the shorter juridical sight of different individuals. Upon what may lie beyond this larger, or human, horizon, its province is not to speculate.

Various consequences flow from this. One is, that I set down no proposition as law simply because some judge has

uttered it. However imperfectly I may have carried out the plan of this writing, it is first to lay every formula of doctrine at what may be deemed the focus of the human horizon, and then to accept it only if, on being compared with the mass of doctrines within such horizon, it is found to be correct; or if, not being found so, it has become irrevocably established by adjudication under the rule of *stare decisis*.

Another consequence is, that, by lifting and extending the horizon under which various decisions in departure from the better doctrine were pronounced, I have been able to state the law, it is believed, in a way to produce harmony in the place of discord in future adjudications. When, thirty-five years ago, I made my first appearance as a legal author in "Marriage and Divorce," I did not venture to entertain anticipations so sanguine. But the observations of intervening years have shown that our judges, in exact obedience to duty, while paying no heed to the mere *dictum* of an author, or even to *his* reasonings, if he has the folly to introduce them into his book, are always swayed by the *reasonings of the law*, whenever so presented as to be duly apprehended by them. Even those few judges are who profess not to be influenced by any sort of reasoning, or who deny that there is such a thing as legal reason. To say otherwise would be to charge our judiciary with the grossest dereliction; for it is the first and chief judicial duty to follow the law, and the *law's reasonings constitute the law*. Nor is it material to the effect of these reasonings whether they are suggested by a legal author, by counsel in a cause, by the crier of the court, or by any lettered tramp.

Fourthly. *Practical or Scientific*.—The terms "practical" and "scientific" have been so abused, in their application to legal text-books, that it is impossible for me to say anything on this subject except under the probability of being misunderstood. According to my understanding, these two words, so applied, are exact synonyms. Nothing is scientific

which is not practical, or practical which is not scientific. And the thing which is equally well expressed by either word is what I have endeavored to produce in this volume, — not either one of the two different things which are oftener meant by those who use them.

To state the law exactly as it is, making my book neither more nor less scientific than the law, — to write the best practical book possible for me, — this one thing, expressed in these two forms, is what I have striven after in this volume.

For example, we have various classes of law books ordinarily termed practical, while they are so but in part. They comprehend all those differing ones the object whereof is only to state what the courts have heretofore adjudged, in distinction from what they will decide in the future. I do not undervalue learning which goes thus far, and there stops. But I have never written, and I do not now write, simply to impart this learning. The practical question with every lawyer, under whatever circumstances, is, “What will the court which decides my causes, on being duly enlightened, hold in the future?” Historically, it may be as interesting to know what has been adjudged in the past as how the battle of Waterloo resulted. But, beyond the domain of history, the past is dead and buried. We are all now dealing with the present and the future. The general of to-day will study the Waterloo battle of yesterday as one of the means of instruction for planning the battles of to-morrow. So likewise the lawyer of to-day will inquire into the decisions of yesterday, in so far as they may help him to shape to-morrow’s contests in the courts. But the thing he cares for, the practical thing with him, is of to-morrow; not of yesterday.

In like manner, the various forms of speculation which are inaccurately termed scientific have their uses. Thus, if an author takes up an axiomatic proposition of natural reason, walks through the law with it, and points out that here the

law fits it and there it does not, pronouncing our jurisprudence to be therefore wrong at the latter places, the mind of the reader is wholesomely diverted and stirred. He is now prepared to apprehend the further and true idea, that the law has adopted very many axiomatic propositions of natural reason, and with them many technical ones which the courts and legislative bodies invented; that it is a practical science, devised to do justice in an immense variety of actual affairs; and, therefore, that it thence becomes of the highest importance to the practising lawyer to learn what are the principles which the law recognizes, and how they operate singly, or in combination, or which ones must in particular circumstances give way to what others. Still, for myself, I have striven rather to avoid than to develop a science which perverts the law.

Fifthly. *The Reasoning.* — The law which the superficial observer sees, consists of unwritten rules, of statutes, and of written constitutions. But the law which actually controls affairs is composed of the deductions of judicial reason from these, for the guidance of persons under ever-shifting facts. The rules, whether written or unwritten, are, while standing inert, like a human body from which the soul has fled. It is juridical reason, or reasoning, — in other words, the law's reasoning, — which gives life and effect to what would otherwise be mere dead matter. Hence our jurisprudence is commonly spoken of as a system of legal, or technical, reasoning. But the law can express its reasoning only in words, through the lips or pen of man. In the same way, a man expresses his own reasoning. Out of this fact has grown a jumble of ideas. Some object to the embodiment, in a law book, of the author's reasoning. I think all ought to object; for it is liable to be confounded with the reasoning of the law, and thus practically to mislead. From the present book, therefore, the same as from all my others, I have carefully excluded every particle of my own reasoning. Others, not

distinguishing the law's reasoning from the author's own, object even to it. But a book without it is never, whatever the author may call it, a law book. So I endeavor to set down the law's reasoning; and if, as may sometimes happen, there is found to be a reader unable to distinguish the law's reasoning, when given in my words, from mine, the misapprehension is one for which I am in no degree responsible.

There are, in our profession, young men and imperfectly educated older ones, who, not having discerned the distinction between the law's reason and natural reason, deem the more helpful book to be the one which is really made valueless by excluding from it all reason, and stating the mere naked points. It has been so from the earliest periods downward. Books termed legal treatises, with no law in them, — some with the author's lucubrations in the places where the law ought to be, and others with nothing but the bare points, — have come in applauded swarm after swarm, then passed away to a neglected death. And thus it will be onward from generation to generation, unless this course of things is intercepted by a more enlightened professional education. I have striven to avoid this error, yet with what success it is not for me to say.

Finally. *Need of the Book.* — When I left practice for law writing, I resolved, and made the resolution irrevocable, to write no book which I should not deem to be imperatively needed. Not undertaking to say what, had I been tempted, I might have thought of the morality of imposing an unnecessary burden on the profession, I should but too gladly have returned to the more lucrative practice if the time came when there was nothing to write on the principle thus laid down. Of course, the decision as to any book could be made only by myself, and at my own peril. As to my first venture, "Marriage and Divorce," the profession has sustained me by using the book almost exclusively these thirty-five years since it originally appeared; and the courts have

made its doctrines, every one of them, as laid down in the first edition, theirs, not only in substance but in form. My great venture, the Criminal Law Series, was finished less than two years ago when "Directions and Forms" appeared; but, for many years, there have been no books on criminal law, pleading, practice, or evidence used to any wide extent except mine, or those which upon their face have been transmuted from what was most steeply unlike into the closest imitations of them. If there is any reader not aware of the facts as to this, let him look into the books, edition by edition, observing the dates, and learn. Or, for a short method, let him compare my recently published "Directions and Forms" with the like books previously before the profession, then compare the prior parts of my Criminal Law Series with the current books other than mine, noting the dissimilarities in the one case, and the similarities in the other. From discovering that "Directions and Forms" did not cast shadows while yet it did not exist, the step will be easy to the discovery that so likewise did not the other books of the Series, between which and the corresponding ones previously in use there was originally as wide a difference as there is now between "Directions and Forms" and the prior books of Precedents; the shadows coming, growing, and varying with the forming, enlarging, and improving substance.

Having thus been sustained by the profession as to my earlier works, I should like to be so also as to the present one. But I neither expect nor ask that no other book on contracts shall be bought or used. Nor do I desire that the other books shall be changed to imitate mine, or otherwise kneel to them, or adore. Nor yet do I crave from the profession so immediate an approving response, in any form, as in the other two instances. Having stated the principle on which the determination to write this book proceeded, I am content that the Future shall take her own time for recording the verdict, for or against me.

Yet I cannot close this preface without expressing my admiration for the learning and labor with which some of the books on this subject, now in professional use, were written. The most important ones, I believe all in which any informed person would expect to find valuable ideas of the author's own, with the exception of those written only for students, were beside me while writing. Undoubtedly I have overlooked much worthy matter in them ; but I have occasionally referred to them, always where I derived any help from them, unless now and then, yet seldom, a mere reference to a case. These are Parsons on Contracts, a work which has long stood at the very head in popularity ; the venerable Chitty, a book old when I was a law student, yet ever fresh ; the later Addison, Leake, Pollock ; and the smaller works of Smith and Metcalf.

J. P. B.

CAMBRIDGE, Jan. 1, 1887.

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LAW OF CONTRACTS.

LAW OF CONTRACTS.

CHAPTER I.

PRELIMINARIES.

§ 1. **Orderly Development.** — This work, being addressed as well to readers wholly unacquainted with the law as to advanced students and lawyers, should, for the sake of the former class, begin at the beginning. And a considerable part of the latter class will be equally benefited by this method ; for, as the law is often studied among us, the beginning is altogether neglected. Every science has its first, second, and third things, the same as its one hundredth, two hundredth, and three hundredth. And the learner who commences with the three hundredth, and travels backward to the first, takes each step at disadvantage. He comprehends nothing well, the atmosphere of his science seems a haze, the relations of things are imperfectly discerned ; his mind, instead of growing, dwarfs ; and, though at last he has gained something, it is too little for the sacrifice made. But he who, with mental faculties adapted to his science, takes up, examines, and lays away the things in their order, discerns all clearly, and makes rapid growth both in knowledge and power. Let us, therefore, to such extent as is practicable, here begin at the beginning. But —

§ 2. **Elsewhere.** — The author in his other writings has presented much of what thus belongs at the beginning. Repetitions are as far as possible to be avoided. Yet this matter

is in importance so transcendent that the reader is requested to excuse some repetition of it ; while, on the other hand, this consideration, as well as the great demand made on these pages by the main subject of the work, will induce brevity. Again, —

§ 3. **Necessary Limitation.** — In the nature of any legal subject, where doctrine limits and extends doctrine, there is no possible division, no setting down of the first things first, so orderly as to enable the learner to understand everything quite perfectly as he goes along. For, whatever be the arrangement, the fuller expositions of what must stand later on will cast backward their light upon what went before.

§ 4. **Whence the Law.** — Contrary to the idea of many unthinking people, the law is not a mere emanation from the legislature, mingled with judicial breath. Like the atmosphere and the other surroundings of man, it came from God ; and the capacity to comprehend it is one of the attributes of the human mind. It is this capacity which sees the relations of things, and distinguishes right and wrong.

§ 5. **Law a Necessity.** — The existence of man without law is impossible.¹ Hence, —

§ 6. **Growth of Law.** — As there always was law, and as the law which God gave to man filled the whole atmosphere of his existence, our human laws are, and should always be contemplated as being, limitations, modifications, and definings of the divine ; or, to be exact, the first human law was a modification of the divine, the second was a modification of the modified mass, and thus the course of legal things has been running onward to the present time. This is important to be borne in mind. A statute, for example, is not construed as a mere original provision, but as an element added to the prior mass of laws ; modifying yet not necessarily repealing them, and limiting and being extended by them.²

§ 7. **Whence.** — The familiar method of making or modifying laws is by legislative enactment. Yet, in fact, not all

¹ 1 Bishop Crim. Law, § 5-7.

² Bishop Written Laws, § 82, 86 et seq.

our human laws or their modifications are of this sort. Indeed, the laws which were never written in statutes number many times more than those which are thus written. They proceed from custom or usage, from the enlightenment of the human understanding and conscience, and from the decisions of the courts; and these laws, termed unwritten, even control the interpretation and effect of the statutory laws.¹

§ 8. **Unwritten Law with us.** — Our unwritten or common law was brought from England by our forefathers; it is, with exceptions and qualifications not necessary to be here specified, the law of England, common, equitable, in some degree ecclesiastical, and statutory, as it stood at the time when the several colonies which afterward became our original States were respectively settled.

§ 9. **How the Law regarded now.** — Practically, at the present time, we are to look upon the law as a mass of original right furnished by God for human use, its several parts variously curtailed, extended, made exact, or otherwise defined by man, through lines of doctrine drawn as the exigencies of his situation required, some proceeding from usage, some from judicial decision, some from statutes, and some from our written constitutions.

§ 10. **Judicial Decisions.** — Not all the law is administered by the courts; but most of it is, including that to which this work is devoted. The courts, to administer any law, must first expound it;² hence, though they do not make law, they make expositions which in a certain sense have the effect of law. While, as all are aware, they declare the meaning of statutes and written constitutions, they do equally the same of the customs and usages which are proved before them, or of which they take judicial cognizance, and of the rules involved in their own and their predecessors' prior decisions. And, —

§ 11. **Stare Decisis.** — Commonly, when an interpretation of any sort of law has been made by the higher courts, especially one establishing a rule of property which the people

¹ Bishop Written Laws, § 131-137.

² *Ib.* § 116.

have acted upon, it will be adhered to in subsequent cases.¹ But sometimes, even in a case of this sort, the court will refuse to follow it afterward, if obviously it proceeded from mistake, and justice or the harmony of the law requires; while in other classes of cases the reversal will be more readily made, though oftener what has been decided once or twice will ever after be accepted as the law. Moreover,—

§ 12. **The Decision and its Reasons, compared.**—The reasons which a court gives for its decision are not, like the decision, binding on a subsequent tribunal. They are looked into, and are often but not necessarily followed. While the result is right, they may be wrong.² *A fortiori*, the mere *dictum* of a judge, in a matter not within the record, is not an authority in a subsequent case.³

§ 13. **With us,**—most of the cases to which in practice a tribunal is referred, or which are cited in a legal treatise, are not of authority in the court with which a particular practitioner or reader is concerned. For in no one of our States are English adjudications which were pronounced since the American Revolution, or those of any other of our States, except a parent State as to what transpired before the State was divided, to be deemed authority; while yet such decisions are commonly and properly cited, and are regarded with respect. The discerning reader, therefore, will see that with him much of what in this work is set down as the law rests, in fact, simply on its reasons and the respect due to the opinions of learned men; but it is open to question in the tribunals of his own State, though it may not be in those of England or of another State of the Union.

§ 14. **Reason as Law — The Instances.**—When a court decides that a defendant must pay the plaintiff the five dollars promised for a hat, it, in strictness, adjudges nothing concerning the purchase of a suit of clothes, or of a hat for any

¹ *June v. Purcell*, 36 Ohio State, 396; *Rex v. Pedley*, Cald. 218, 227; *Barden v. Southerland*, 70 N. C. 528, 530.

² *Bishop First Book*, § 169; *Palmer v. Yarrington*, 1 Ohio State, 253, 262.

³ *Bole v. Horton*, Vaugh. 360, 382; *Cutler v. Bonney*, 30 Mich. 259, 262; *Rohrbach v. Germania Fire Ins. Co.* 62 N. Y. 47, 58; *Gordon v. Harper*, 7 T. R. 9, 11; *Rex v. Jarvis*, 1 Bur. 148, 153.

other price. Yet, *in reason*, if the law compels one to pay according to agreement for his hat, it should make him pay, in like manner, for his other clothing. Moreover, it should, *for the same reason*, enforce against him the payment he agrees to make for his flour, for the help in his house, and for the house itself. But, aside from *reason*, there is no ground upon which one decision of a court can be authority for another; for, in the infinite variety of human things, no two cases are in all their facts precisely alike. Hence it is established doctrine that the law is a system of *reason*, or *reasoning*, and that the several decisions are merely *instances* within a larger rule. There have always been persons, accredited as lawyers, who deny this, but no great master of the law ever denied it, and our books are full of expressions affirming it.¹ So that, though a court may find no case from the facts of which to decide a particular question before it, and in this sense the question is new, if it finds a *principle*, within which the case falls, it will proceed thereon with the same confidence as though there were thousands of decisions.² The visible signs of the law, therefore, are the adjudged cases, reported in our authoritative books of reports; but the law itself consists of principles invisible to the outward eyes, yet *by reason* brought to the cognizance of the understanding. This is so even in the domain of statutory law; for what the courts enforce, is not the collection of words in which the legislature has written its will, but its interpreted will deduced from the words, and applied to the particular facts of each successive case *by reason*. Now, —

§ 15. **Nature of Reason.** — The reason, whereof it is thus seen the law consists, is not, to borrow Lord Coke's words, "every man's natural reason," but it is "an artificial perfec-

¹ For example, consult *Williamson v. Beckham*, 8 Leigh, 20, 24; *Rex v. Bembridge*, 3 Doug. 327, 332; *People v. Fish*, 4 Parker C. C. 206, 211; *Jones v. Randall*, Lofft, 383, 385.

² *Collins v. Blantern*, 2 Wils. 347, 352; *Carruthers v. Hollis*, 8 A. & E. 113, 117; *Keeble v. Hickeringill*, 11 East, 574, 575, in notes; *West London*

Commercial Bank v. Reliance, &c. Soc. 27 Ch. D. 187, 195. "Precedents are useful to decide questions; but, in such cases as depend upon fundamental principles from which demonstrations may be drawn, millions of precedents are to no purpose." *Vaughan, C. J.* 8 Howell St. T. R. 78; *Vaugh.* 419.

tion of reason, gotten by long study, observation, and experience.”¹ It is the same reason which the Maker gave to man for his guide in all earthly affairs, yet it cannot be made practically available in the law by one uninstructed in what is already established therein. For the law is a harmonious system,² consisting of technical rules drawn upon a groundwork of natural right; and it is vain for one to reason upon it, until he has acquired, at least, some competent knowledge of the technical rules with which the question he is considering comes in contact, and from which it receives its solution. In other words, the reason of which the law consists is not the reason of the mere moralist, or of the man of affairs, or of the legislator, but it is the *reason of the law*. In this sense, yet in no other, the law, which the student of our laws is to acquire, is a system of legal reason. And he becomes competent to practise it only when he has acquired the power to frame an argument, not like the metaphysician, but like the personified Law, after the law’s methods, laying down the law’s propositions, not his own, and drawing, not his individual conclusions, but the law’s.

§ 16. **What for this Work.** — It is proposed in this work to state the leading principles of the law of its subject after the manner of the law’s reasons. Unless the author fails in his purpose, his own reasoning will not here appear; it will be the law’s. It will be necessary, therefore, to present, not merely the legal doctrines, but also the several manners of their application. This will be done by mingling with the doctrines sufficient illustrative *instances*.

§ 17. **How read.** — This work is so condensed and its annunciations of legal doctrine are so carefully constructed, every word having its use, and there being little repetition, that the reader is required to note the exact terms of every sentence, or he will fail of the full benefit meant. This caution is of the utmost importance in view of the fact that the

¹ Co. Lit. 97 b; Bishop First Book, § 72.

² Such is the theory of it, and it is practically so in the main; but the

moulding hands of imperfect man have left in it some imperfections, and with these the student should acquaint himself the same as with the rest.

present generation is given to reading too rapid to be serviceable in the pursuit of science. What Lord Coke said of his Reports is even more important in respect of the present work; namely, "I desire the reader, that he would not read, and as it were swallow, too much at once; for greedy appetites are not of the best digestion. The whole is to be attained to by parts; and nature, which is the best guide, maketh no leap." And to enforce this view he brings forward the authority of Seneca; thus, "*Quo plus recipit animus, hoc se magis laxat*; the mind, the more it suddenly receiveth, the more it loseth, and freeth itself. A cursory and tumultuary reading doth ever make a confused memory, a troubled utterance, and an incertain judgment."¹

§ 18. **Collateral Reading.**—The construction of this work is such that it may be serviceably read through, in its order, without any collateral helps. But the reader will not thus derive from it the full benefit it is capable of conferring. Since many questions depend more or less upon statutes which are not quite identical in all our States, he should have before him the statutes of his own State, and carefully note (upon the margin of the book, if he owns the copy which he is reading, and) in his understanding and memory, everything in the statutes which modifies in any degree the statements in the book. In like manner, the decisions of his own court may not in every particular harmonize with the general doctrine, therefore he should have them before him, and note the differences. Moreover,—

§ 19. **Cases cited.**—To an extent to which the reader can best judge for himself, he should read, in connection with the text, cases cited in the notes. In a few instances, the case first cited will be found specially pertinent, but not so generally. He will commonly prefer those of his own State, and will make selections from other States and from England according to his own particular bias. The objects to be accomplished by this collateral reading of cases are numerous. One is to extend his views of the doctrine. Another is to teach him practically how legal doctrine is derived from the

¹ 6 Co. Fras. ed. Pref. 18.

adjudged cases,—a matter of the utmost importance. A large part of every lawyer's work consists of informing himself and the courts of the law which governs a particular state of facts, by consulting what has already been decided. And one of the very great obstacles to professional success, which young men encounter without knowing it, is that they are unable to deduce the doctrines of the law from the decisions, and apply them to facts differing from those on which the decisions were rendered. The doctrine, it should be remembered, dwells in the law; often it is announced in terms by the judge delivering an opinion, but not always, and sometimes a wrong doctrine is laid down by him; often it is derivable from a single case, yet in other instances it can be learned only by comparing case with case, and accumulating numerous cases which, no one of itself, no half dozen of themselves, but all in combination, sustain one brief proposition, never in terms announced by any judge; often—but the forms and methods are numberless. The author is tempted to extend this matter here to great length, with explanations and illustrations; but, on reflection, he feels compelled to reserve his space for the direct subject of the work, Contracts.

§ 20. **Other Books on Contracts**—may, if the reader chooses, be perused in connection with this one. For occasional consultation, if no more, they will be useful.

§ 21. **Distinguishing Doctrine from Illustration.**—One who reads this or any other book of the law should carefully and constantly distinguish doctrine from illustration, and lay the results away in his memory accordingly. The neglect to do this is not a small factor among the causes which produce so many incompetent lawyers. This general idea is always acted upon in successful practice. The master of his profession, to whom a question of law is submitted, first considers the principles of law involved in it, then searches the reports for illustrations.

BOOK I.

THE MORE GENERAL DOCTRINES WITH THEIR
ILLUSTRATIONS.

CHAPTER II.

THE ELEMENTS OF A CONTRACT.

§ 22. **Defined.** — A contract is a promise from one or more persons to another or others, either made in fact or created by the law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration, or being executed, and not being in a form forbidden or declared inadequate by law.¹ More in detail, —

¹ Some of the definitions in our other books are —

Blackstone. — “An agreement, upon sufficient consideration, to do or not to do a particular thing.” 2 Bl. Com. 442.

Kent. — The same as Blackstone, both limiting the definition to executory contracts. Kent deems this definition “distinguished for neatness and precision.” It is found also in some other books. 2 Kent Com. 449, note.

Marshall, C. J. — “A contract is an agreement in which a party undertakes to do or not to do a particular thing.” *Sturges v. Crowninshield*, 4 Wheat. 122, 197.

Freedman, J. — “The union of two or more minds in a thing done or to be done.” *Dietz v. Farish*, 53 How. Pr. 217, 221.

Parsons. — “An agreement between

two or more parties for the doing, or the not doing, of some particular thing.”

1 Pars. Con. 6.

Chitty. — “A contract or agreement not under seal may be defined to be an engagement entered into between two or more persons, whereby, in consideration of something done or to be done by the party or parties on one side, the party or parties on the other promise to do or omit to do some act.” 1 Chit. Con. 11th Am. ed. 11.

Savigny. — A correspondent calls my attention to Savigny’s much admired definition; namely, “A contract is the agreement of several persons in a concurrent declaration of intention, whereby their legal relations are determined.” *Syst. Mod. Roman Law*, § 140. The translation given in *Pollock Con. 2*, is slightly different, “When two or more

§ 23. **Executed.** — Where a promise without consideration has been executed, the courts will not disturb what has been done under it. But, —

§ 24. **Consideration.** — Except in contracts by specialty or by record, the performance of the promise will not be enforced unless there is for it an adequate consideration. Even, it is believed, the law will not create or imply a contract without a consideration.

§ 25. **Kinds of Contract.** — A contract may be —

Specialty. — A specialty; that is, an instrument under seal.¹ Or, —

Record. — It may be by matter of record.² Or, —

Parol. — It may be a parol contract.³

§ 26. **How Parol Contracts divided.** — Parol contracts are divided⁴ into —

Written. — Written contracts not under seal,⁵ and

Oral. — Contracts by mere spoken words.⁶ But —

§ 27. **Explanation as to Parol.** — The term “parol” properly means by word of mouth;⁷ and it is employed by legal writers to distinguish what is spoken from what is written, whether sealed or not. Thus, it is said that parol evidence is inadmissible to vary a contemporaneous writing.⁸ Formerly there was no distinction, in legal effect, between a written contract not under seal and an oral one; and the term “parol,” as applied to either, was not misleading. Now there are various statutes requiring what might then have been done by word of mouth to be in writing; therefore, at

persons concur in expressing a common intention, so that rights or duties of those persons are thereby determined, this is an agreement.” The words of the original are, *Vertrag ist die Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch ihre Rechtsverhältnisse bestimmt werden.*

For other definitions, see *Pelham v. The State*, 30 Texas, 422, 426; *Johnson v. Martin*, 54 Ala. 271.

If my definition is in more words than the others, it is more complete and exact in meaning, hence more serviceable. How it compares in neatness and

literary taste, there is, therefore, no occasion to inquire.

¹ Post, § 103 et seq.; *Chit. Con.* 11th Am. ed. 4.

² Post, § 140 et seq.; *Salisbury v. Philips*, 1 Salk. 43.

³ *Chit. Con.* 11th Am. ed. 5, 6; *Rann v. Hughes*, 7 T. R. 350, 351, note.

⁴ *Ballard v. Walker*, 3 Johns. Cas. 60, 65.

⁵ Post, § 162 et seq.

⁶ Post, § 151 et seq. See *Met. Con.* 3, 4.

⁷ *Toml. Law Dict.* Parol.

⁸ 1 *Greenl. Ev.* § 275.

this day, if an author would avoid being misunderstood, he should generally designate what used to be called a parol contract by the word "oral" or "written," as the fact in the particular instance may be. Again, —

§ 28. **Implied.** — Sometimes a contract is implied where there is no direct proof of any, or, in fact, none has been made. The term "implied" is vague, and contracts under this name differ greatly. Of implied, —

Created by Law. — There are contracts, commonly called implied, which, to speak more accurately, are created by the law to establish justice between the parties. They do not require mutual consent, but may even bind a party against his will.¹ Or, —

Implied as of Fact. — In other circumstances, the presumption, in the absence of rebutting proof, is that the parties really consented; and it is a good defence for one to show that, in fact, he did not consent. This contract, also, is designated as implied. Or, —

Implied from Express. — A contract may be implied by the law out of the terms of an express one, viewed in connection with the circumstances and the subject.

§ 29. **Parties.** — As one cannot sue himself,² or, consequently, enter into any obligation enforceable by law with himself,³ there must be two or more parties to every contract. And, unless it is a contract which the law has created, —

Of Sound Mind. — A party, to be bound, must be of sufficiently sound mind to give the needful assent. Also, —

Of Adequate Age. — He must be of such age as the law requires. And —

No Legal Disability. — He must not be under any such legal disability as avoids the contract. A familiar but not the only illustration of this, is a married woman, where the common-law rules prevail.⁴

¹ Post, § 181 et seq.

Whitehead v. Hellen, 76 N. C. 99; Col-

² Moffat v. Van Millingen, 2 B. & P. 124, note.

lins v. Tilton, 58 Ind. 374.

⁴ 1 Bishop Mar. Women, § 842.

³ Taussig v. Hart, 58 N. Y. 425;

§ 30. **Minds in Accord.**—Except where the contract is created or implied by law, the minds of the parties must come into complete accord, the one consenting to exactly the same thing to which the other does.¹

§ 31. **Subject.**—The contract must be for something which the law permits to be contracted for,—not contrary to the law or its policy.² Finally, —

§ 32. **Law's Forms.**—In some circumstances, the law has made a particular form necessary; as, by specialty, or simply by a writing which need not be under seal, or by written words prescribed by a statute. A mere oral undertaking, or a written one not conforming to law, will then, of course, be inadequate.

§ 33. **Course of the Discussion.**—These elements of contract, and some others not necessary here to be mentioned, will occupy us through a series of chapters. We shall then proceed with such further unfoldings as will bring to view, and so far illustrate as to render comprehensible, most of the doctrines of the law of contracts.

§ 34. *The Doctrine of this Chapter restated.*

To sum all up, a contract is a promissory obligation in such form, and founded on such reasons, as the justice or policy of the law has prescribed to render it binding. In general, this obligation is not forced upon men, but is made to depend on their free consent; for, by this rule, the justice and policy of the law are in most instances best promoted. And none can consent without legal and actual capacity. But if one resists the justice of the law, or is destitute of capacity to consent, and the general or individual weal requires that there should be a contract, the law will imply it as of fact, or create it by indisputable presumption.

¹ Post, § 312 et seq.; *Peirce v. Burroughs*, 58 N. H. 302; *Smith v. Gowdy*, 434, 2 Jur. 595; *Hawes v. Stebbins*, 49 Cal. 369; *Dunkin v. Hodge*, 46 Ala. 523; *Cope v. Rowlands*, 2 M. & W. 149.

² *McKinnell v. Robinson*, 3 M. & W. 149.

CHAPTER III.

THE CONSIDERATION.

- § 35, 36. Introduction.
37-75. In General of the Consideration.
76-79. Contract wholly executory (Mutual Promises).
80-84. Wholly executed.
85-87. Executed in part.
88-93. Consideration executed.
94-100. Waiver as to Consideration.
101, 102. Doctrine of the Chapter restated.

§ 35. **Here — Elsewhere.** — The consideration is a prime element in every contract; hence the more convenient form for these elucidations will be to present, in this chapter, an outline of the doctrine as it threads the entire law of contract, leaving various special illustrations of it for the particular topics.

§ 36. **How Chapter divided.** — We shall consider, I. In General of the Consideration; II. Where the Contract is wholly executory, as depending on Mutual Promises; III. Where it is wholly executed; IV. Where it is executed in part; V. Where the Consideration is executed; VI. The Waiver of Imperfections in the Consideration.

I. *In General of the Consideration.*

§ 37. **Compared with Motive.** — The motives to promises are numerous. One motive, for example, is to confer a benefit on the promisee; springing from particular affection, or from general benevolence. Another is to obtain the *quid pro quo*; that is, the consideration, in exchange for which the promise is given. So that, though the con-

sideration may be deemed a motive, it is one only among many motives.¹

§ 38. **Consideration defined.** — A consideration is something esteemed in law as of value, in exchange for which the promise in a contract is made.²

§ 39. **Whence and Why.** — The doctrine of the consideration is said to have been introduced into the common law from the civil. But its civil-law and common-law forms differ considerably, whether the comparison is made with the Roman law, or with that of modern Europe.³ In morals, no consideration is required to render a promise binding; for it is a grievous wrong to excite one's hopes by a promise, and then refuse to fulfil it. Moreover, in this way a confiding person may be ruined, should he, relying on the promise, assume obligations which on its breach he cannot discharge. So that, when the law declines to enforce an undertaking entered into without consideration, it does not declare its

¹ And see *Philpot v. Gruninger*, 14 Wal. 570; *Rockwell v. Brown*, 54 N. Y. 210; *Thomas v. Thomas*, 2 Q. B. 851, 859.

² Other definitions are, —

Termes de la Ley. — "Consideration is the material cause, or *quid pro quo*, of a contract, without which it will not be effectual or binding." Adopted in *Met. Con.* 161.

Dyer. — "A consideration is a cause, or meritorious occasion, requiring a mutual recompense, in fact or in law." *Calthorpe's Case*, 3 Dy. 334 b, 336 b. Adopted in *Met. Con.* 161.

Evans. — "Any act by which the person making the promise has benefit, or the person to whom it is made has any labor or detriment." App. to *Pothier's Obligations*, approved in *Pollock Con.* 2d ed. 151. "A consideration is sufficient if there be a benefit to the defendant or a detriment to the plaintiff." *Blackburn, J. in Edgeware Highway Board v. Harrow Dist. Gas Co.* *Law Rep.* 10 Q. B. 92, 95.

Lush, J. — "A valuable considera-

tion, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." *Currie v. Misa*, *Law Rep.* 10 Ex. 153, 162.

Patteson, J. — "Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the plaintiff, or some detriment to the defendant." *Thomas v. Thomas*, 2 Q. B. 851, 859.

Kent. — "A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made." 2 *Kent Com.* 465.

Leake. — "The consideration may be described generally as some matter accepted or agreed for as a return or equivalent for the promise made, showing that the promise is not made gratuitously." *Leake Con.* 17.

³ 2 *Kent Com.* 463; *Pollock Con.* 2d ed. 151-155; 1 *Pars. Con.* 427 et seq.

violation just, but simply it will not take jurisdiction to rectify the moral wrong.

§ 40. **Required.** — It is, therefore, the rule of our law, prevailing both in the courts of law¹ and in those also of equity,² that no executory, simple contract is valid without a consideration. The contracts here meant are express ones, and those implied as of fact; yet it is believed likewise that, without a consideration, the law never creates a contract.³

§ 41. **Nature of Value.** — Our law estimates its values⁴ in money. So that one who has suffered a civil wrong of whatever nature, when he sues the wrong-doer for his damages, can have a judgment expressed in dollars and cents, but not in anything else. True, there are actions at law for the possession of lands, in equity for specific performance, and other like actions; but they all relate to things which may be estimated in money. Even a divorce suit is of this sort; for a man who has seduced away another's wife can be made to pay money damages. Hence, in reason, and it is believed substantially on the authorities, the consideration should be something to which a jury can attach pecuniary value; though, like the value of a thing stolen in larceny,⁵ it may be less than the smallest coin or denomination known to the law. Still, —

§ 42. **Exception — "Love and Affection" — (Deed).** — A deed of land offers a single exception, peculiar in its nature. We shall see in the next chapter that a seal imports a consideration, so no actual one need in general be added to make a sealed contract binding. But for a technical reason a deed of land, which is under seal, if, like most of our deeds, it derives

¹ *Travis v. Duffau*, 20 Texas, 49; *Dœbler v. Waters*, 30 Ga. 344; *Lowe v. Bryant*, 32 Ga. 235; *Aldridge v. Turner*, 1 Gill & J. 427; *Tenney v. Prince*, 4 Pick. 385, 7 Pick. 243; *Bailey v. Walker*, 29 Misso. 407; *Lang v. Johnson*, 4 Fost. N. H. 302; *Culver v. Banning*, 19 Minn. 303; *Eagle Manuf. Co. v. Jennings*, 29 Kan. 657; *Hendy v. Kier*, 59 Cal. 138; *Reynolds v. Burling-*

ton, &c. Railroad, 11 Neb. 186; *Gay v. Botts*, 13 Bush, 299.

² 1 Story Eq. Jur. § 787; *Leake Con.* 608; *Littlejohn v. Patillo*, 2 Hawks, 302; *Washington Bank v. Farmers Bank*, 4 Johns. Ch. 62.

³ Ante, § 24.

⁴ Ante, § 38.

⁵ 1 Bishop Crim. Law, § 224.

its effect from the Statute of Uses, must be founded on an actual consideration.¹ Now, by early decisions, extending more or less downward to later periods and our own country, if the deed was by what was called bargain and sale, the consideration for it must be of the "valuable" sort;² but, if it was by covenant to stand seised, which was the form in family settlements and conveyances to the grantor's relatives, the "good" consideration of "love and affection" was appropriate and sufficient.³ Thereupon, when a deed of bargain and sale was found to lack its valuable consideration, and to be inadequate as such, if it was between persons so related that it should have been by covenant to stand seised, supportable on love and affection, the court, to give effect to the intent of the parties, would treat it as a covenant to stand seised;⁴ thus was the distinction, as to the form of the deed, broken down. Time and legislation have exerted still further modifying influences both in England and with us. So that now, in each of our States, we have in practical use but a single form of deed; requiring, if between strangers, the valuable consideration; if between the other parties mentioned, the mere "good" consideration will, where no rights of third persons intervene, suffice.⁵ For the purpose of this distinction, —

§ 43. "Good," "Valuable," defined. — "A good consideration," says Blackstone, "is such as that of blood, or of nat-

¹ Post, § 124.

² *Mildmay's Case*, 1 Co. 175 a, 177, and the authorities in the next note.

³ *Sharington v. Strotton*, Plow. 298, 301, 309; *Ward v. Lambert*, Cro. Eliz. 394; *Milburn v. Salkeld*, Willes, 673; *Bedell's Case*, 7 Co. 40 a; *Goodtitle v. Petto*, 2 Stra. 934; 4 Kent Com. 492; *Saunders v. Cadwell*, 1 Cow. 622; *Howell v. Delancey*, 4 Cow. 427; *Gault v. Hall*, 26 Maine, 561; *Houseman v. Sebring*, 16 Johns. 515; *Perry v. Price*, 1 Misso. 553.

⁴ *Crossing v. Scudamore*, 1 Vent. 137, 1 Mod. 175; *Milburn v. Salkeld*, Willes, 673; *Wallis v. Wallis*, 4 Mass. 135; *Parker v. Nichols*, 7 Pick. 111. "It is a principle of law, that, if the form of

the conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under the assumption of another character, so as to give it effect." 4 Kent Com. 493. And see post, § 395.

⁵ *Gale v. Williamson*, 8 M. & W. 405, 409; *Gully v. Exeter*, 10 B. & C. 584; *Schnell v. Nell*, 17 Ind. 29; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Ford v. Ellingwood*, 3 Met. Ky. 359; *Pennington v. Gittings*, 2 Gill & J. 208; *Hayes v. Kershaw*, 1 Sandf. Ch. 258; *Coggeshall v. Coggeshall*, 2 Strob. 51; *Killough v. Steele*, 1 Stew. & P. 262; *Stovall v. Barnett*, 4 Litt. 207; *Hanson v. Buckner*, 4 Dana, 251; *Blackerby v. Holton*, 5 Dana, 520.

ural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant; and is, therefore, founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favor of creditors and *bona fide* purchasers.”¹

✓ ✓ § 44. “**Moral Obligation.**”—Some of the older authorities hold, that, if one under what was termed a moral obligation to do a thing promises to do it, this is a consideration rendering the promise valid in law.² Such a doctrine, carried to its legitimate results, would release the tribunals from the duty to administer the law of the land; and put, in the place of law, the varying ideas of morals which the changing incumbents of the bench might from time to time entertain. It does not, therefore, now prevail in England,³ or probably to any wide extent in our States;⁴ though there are States in which it has been adhered to so recently that we could not say it is not there the law now.⁵ And there are American cases in which this untenable doctrine of a moral obligation is put forward as the basis of sound decisions,⁶ which would better rest on other reasons.⁷

§ 45. **Amount of Value.**—Where an exact sum of money is given or to be given by the one party in return for something not money by the other, or where the thing on neither

¹ 2 Bl. Com. 297.

² Lee v. Muggeridge, 5 Taunt. 36; Vance v. Wells, 8 Ala. 399; Hawkes v. Saunders, Cowp. 289, 290.

³ Eastwood v. Kenyon, 11 A. & E. 438; Beaumont v. Reeve, 8 Q. B. 483, 487; Jennings v. Brown, 9 M. & W. 496; note to Wennall v. Adney, 3 B. & P. 247, 249.

⁴ Dodge v. Adams, 19 Pick. 429; Ehle v. Judson, 24 Wend. 97; Waters v. Bean, 15 Ga. 358; Updike v. Titus, 2 Beasley, 151; McElven v. Sloan, 56 Ga. 208; Burton v. Le Roy, 5 Saw. 510; Nine v. Starr, 8 Oregon, 49.

⁵ Montgomery v. Lampton, 3 Met.

Ky. 519; Musser v. Ferguson, 5 Smith, Pa. 475. I forbear to cite the body of the American authorities on either side of this question, since they would occupy space to little purpose. Each practitioner must determine the question, for his own State, upon an examination which could be but little aided by anything further here.

⁶ Ante, § 12.

⁷ For example, Edwards v. Nelson, 51 Mich. 121; Stebbins v. Crawford, 11 Norris, Pa. 289. As to which see Shepard v. Rhodes, 7 R. I. 470. And see post, § 100.

side is money, a court of law and commonly a court of equity will not interfere with their estimates of value, but will hold the contract good though the judge or jury should deem the value to be greatly more or less than the parties did. Yet inadequacy of value may be "strong evidence of fraud,"¹ should that question be raised, or it may suggest fraud;² and, in a gross case, it may be the controlling circumstance in establishing the fraud.³ So, on an appeal to the discretion of the court, in a bill for specific performance, this relief will be withheld, not simply where the price is greater or less than the court would deem adequate, but where it is so much greater or less as to render the bargain unconscionable or its enforcement unjust,—a question upon which there are some distinctions, and perhaps differences of judicial opinion.⁴ But,—

§ 46. **Two Values fixed by Law.**—Where the law has established the values, as it has of coin and some other things, a particular sum of money, or another thing thus made equal in worth to such sum, is not a consideration for a greater sum, or for a thing which the law has made to be worth more.⁵ Thus,—

§ 47. **Fees of Officer.**—If a statute has prescribed an exact fee for the performance of a specified duty by an officer, an agreement with him to pay more is void.⁶ And it is so though

¹ Griffith v. Spratley, 1 Cox, 383, 389.

² Talbott v. Hooser, 12 Bush, 408.

³ Newhall v. Paige, 10 Gray, 366; Earl v. Peck, 64 N. Y. 596; Hunter v. McLaughlin, 43 Ind. 38; Merriman v. Lacefield, 4 Heisk. 209; McMullen v. Gable, 47 Ill. 67; Comstock v. Purple, 49 Ill. 158; Duncan v. Sanders, 50 Ill. 475; Nash v. Lull, 102 Mass. 60; Worth v. Case, 42 N. Y. 362; Callaghan v. Callaghan, 8 Cl. & F. 374; Groves v. Perkins, 6 Sim. 576; Stilwell v. Wilkins, Jacob, 280, 282; Taylor v. Obee, 3 Price, 83; Western v. Russell, 3 Ves. & B. 187; Murray v. Palmer, 2 Sch. & Lef. 474, 488; Clarkson v. Hanway, 2 P. Wms. 203; Griffith v. Spratley, 1 Cox, 383; Hough v. Hunt, 2 Ohio, 495; Green v. Thompson, 2 Ire. Eq. 365; White v. Flora, 2 Tenn. 426; Hardeman v. Burge, 10 Yerg. 202; Knobb v. Lind-

say, 5 Ohio, 468; Osgood v. Franklin, 2 Johns. Ch. 1; Hallett v. Collins, 10 How. U. S. 174; Odineal v. Barry, 24 Missis. 9; Haines v. Haines, 6 Md. 435; McCormick v. Malin, 5 Blackf. 509.

⁴ Haywood v. Cope, 25 Beav. 140; Bower v. Coöper, 2 Hare, 408; Powers v. Hale, 5 Fost. N. H. 145; Gasque v. Small, 2 Strob. Eq. 72; Cathcart v. Robinson, 5 Pet. 263, 276; Seymour v. Delancy, 3 Cow. 445; Harrison v. Town, 17 Misso. 237; Shepherd v. Bevin, 9 Gill, 32; Galloway v. Barr, 12 Ohio, 354; Cole v. Cole, 106 Ill. 482; Conrad v. Schwamb, 53 Wis. 372; Abbott v. Swarder, 4 De G. & S. 448.

⁵ Schnell v. Nell, 17 Ind. 29; Bailey v. Day, 26 Maine, 88. See Brachan v. Griffin, 3 Call, 433.

⁶ Burk v. Webb, 32 Mich. 173; Morrell v. Quarles, 35 Ala. 544; Territory

he puts forth more than the ordinary exertions.¹ But a promise to pay for services quite outside of what the law requires of him may be enforced.²

§ 48. **To do what Law requires.**— One by undertaking to do or by doing what the law or a previous agreement requires of him merits nothing, and it is not a consideration for anything else.³ Thus, —

§ 49. **To pay Interest due.**— A debtor's promise to pay interest for which he is already liable will not support an agreement by the creditor to postpone the collection of the debt.⁴ So, —

§ 50. **Less than due.**— When any ascertained sum of money is fully due and payable from one to another, if the creditor accepts a less sum in satisfaction,⁵ or promises to take less,⁶ the payment in the one instance is a discharge of only so much as it amounts to, and in the other the promise is void. This, in most of the cases, is assumed to be the law, settled beyond controversy. And, on principle, there is here no consideration, and the mere unexecuted promise to accept the less sum is void. But under our third sub-title we

v. King, 1 Oregon, 106; *Evans v. Trenton*, 4 Zab. 764; *Smith v. Whildin*, 10 Barr, 39; *Kernion v. Hills*, 1 La. An. 419; *Decatur v. Vermillion*, 77 Ill. 315; *Joliet v. Tuohey*, 1 Bradw. 483.

¹ *Hatch v. Mann*, 15 Wend. 44.

² *England v. Davidson*, 11 A. & E. 856. Possibly the authorities are not quite in harmony on this question, but I have stated what I believe to be the true doctrine.

³ *Ayres v. Chicago, &c. Railroad*, 52 Iowa, 478; *Tilden v. New York*, 56 Barb. 340; *Eblin v. Miller*, 78 Ky. 371; *Merrick v. Giddings*, 1 Mackey, 394; *Keffer v. Grayson*, 76 Va. 517; *Lydick v. Baltimore, &c. Railroad*, 17 W. Va. 427; *Sherwin v. Brigham*, 39 Ohio State, 137. Compare with *Goebel v. Linn*, 47 Mich. 489.

⁴ *Stuber v. Schack*, 83 Ill. 191; *Dow v. Chambers*, 14 Philad. 647; *Holmes v. Boyd*, 90 Ind. 332; *Hume v. Maze*, 84 Ind. 574.

⁵ *Fitch v. Sutton*, 5 East, 230; *Bunge v. Koop*, 48 N. Y. 225; *Bliss v. Swartz*, 7 Lans. 186; *Bryan v. Foy*, 69 N. C. 45; *Rea v. Owens*, 37 Iowa, 262; *Crawford v. Millsbaugh*, 13 Johns. 87; *Heathcote v. Crookshanks*, 2 T. R. 24; *Smith v. Bartholomew*, 1 Met. 276; *Pearson v. Thomason*, 15 Ala. 700; *Bailey v. Day*, 26 Maine, 88; *Harriman v. Harriman*, 12 Gray, 341; *Curran v. Rummell*, 118 Mass. 482; *Longworth v. Higham*, 89 Ind. 352; *Warren v. Hodge*, 121 Mass. 106; *Lathrop v. Page*, 129 Mass. 19; *Willis v. Gammill*, 67 Misso. 730; *Weber v. Couch*, 134 Mass. 26.

⁶ *Foakes v. Beer*, 9 Ap. Cas. 605; *McKenzie v. Culbreth*, 66 N. C. 534; *Line v. Nelson*, 9 Vroom, 358; *Rose v. Daniels*, 8 R. I. 381; *Moore v. Hylton*, 1 Dev. Eq. 433; *Robert v. Barnum*, 80 Ky. 28; *Smith v. Phillips*, 77 Va. 548; *Bryan v. Brazil*, 52 Iowa, 350; *Lankton v. Stewart*, 27 Minn. 346; *Wharton v. Anderson*, 28 Minn. 301.

shall see that an executed contract requires no consideration;¹ so that, if, on the part payment of a debt, though fully due, the creditor forgives the rest, in any form which will constitute a gift, he can no more maintain a suit for it afterward than for any other gift. And such is believed to be the true law.² Moreover, —

§ 51. **Release under Seal.** — As a seal implies a consideration,³ a creditor's release under seal to his debtor, or even to one of several joint debtors, without actual payment, will bar a suit for the debt.⁴ Or, —

¹ Post, § 80-84.

² *Tyler Cotton-press Co. v. Chevalier*, 56 Ga. 494; *The State v. Story*, 57 Missis. 738; *Lamprey v. Lamprey*, 29 Minn. 151; *Paddleford v. Thatcher*, 48 Vt. 574; *Burrill v. Saunders*, 36 Maine, 409. And see *Murray v. Snow*, 37 Iowa, 410; *White v. Gray*, 68 Maine, 579; *Smalley v. Line*, 1 Stew. Ch. 348; *Paxton v. Wood*, 77 N. C. 11. The cases in which, upon the facts, the question of the effect of accepting a less sum for the greater, viewed as a gift of the difference, might have been raised, have generally passed off without the attention of counsel or the court being directed to the point; and they cannot, in any just view, be an authority for what was not considered. "We take it to be a sound principle," it was observed in the Supreme Court of the United States, "that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made." *Woodruff v. Parham*, 8 Wal. 123, 138. So that, when the cases are properly regarded, there is believed to be not one which is contrary to the doctrine of the text. The facts of some of them exclude this view, and the law cannot draw inferences against the facts. Thus, if the debtor promised to pay the balance when able, *Fitch v. Sutton*, 5 East, 230, there can have been no gift of such balance by the creditor. And when the question is one of pleading, a plea of the acceptance of a less sum in satisfaction of a greater, *Down v.*

Hatcher, 10 A. & E. 121, cannot be adjudged otherwise than bad. Said Holroyd, J. in one of these cases: "An agreement between a debtor and creditor, that part of a larger sum due should be paid by the debtor and accepted by the creditor as a satisfaction for the whole, might, under special circumstances, operate as a discharge of the whole debt. But then the legal effect of such an agreement might be considered to be the same as if the whole debt had been paid, and part had been returned, as a gift to the party paying. Here," &c. *Thomas v. Heathorn*, 2 B. & C. 477, 481, 482. For, as well said by Lord Coke, "a lesser sum of money cannot be a satisfaction of a greater," Co. Lit. 212b; *Pinnel's Case*, 5 Co. 117a; though, obviously, a creditor receiving the less sum may make a gift to his debtor of the balance. It is quite within the principles we are considering, and is sound law, that the payment of a part of a sum due is not a sufficient consideration for a promise to extend the time to pay the residue. *Royal v. Lindsay*, 15 Kan. 591; *Turnbull v. Brock*, 31 Ohio State, 649; *Overton v. Banister*, 3 Hare, 503.

³ Post, § 119; *Rutherford v. Baptist Convention*, 9 Ga. 54; *Patton v. Ashley*, 3 Eng. 290; *Wing v. Chase*, 35 Maine, 260; *Brewer v. Bessinger*, 25 Missis. 86.

⁴ *Schuylkill Navigation Co. v. Harris*, 5 Watts & S. 28; *Bender v. Sampson*, 11 Mass. 42, 44, 45; *Valentine v.*

§ 52. **Payment in Values not fixed.**—If, without the seal, to a partial payment some consideration however small is added, of a sort the value whereof is not, like money or a fee, fixed by law,¹ or if the whole payment is of a like sort,² this, when accepted in full discharge of the debt, will be effectual. Thus (a distinction very thin),—

§ 53. **Payment guaranteed.**—Though the payment of a part, which is accepted in full, will not be adequate, even where the debtor is in failing circumstances; yet a guaranty of such part from a responsible third person,³ or the payment of such part in the third person's notes, which are afterward paid,⁴ or the third person's check,⁵ will operate in law, the parties so agreeing, as a discharge of the whole. So,—

§ 54. **Payment before due—At Different Place.**—If a part is paid before the debt is due,⁶ or at a different place from that originally agreed upon,⁷ the discharge will be good. Or,—

Foster, 1 Met. 520; Walker v. McCulloch 4 Greenl. 421; Lee v. Lancashire, &c. Railway, Law Rep. 6 Ch. Ap. 527, 534; Payler v. Homersham, 4 M. & S. 423; Willing v. Peters, 12 S. & R. 177; Willoughby v. Backhouse, 4 D. & R. 539, 2 B. & C. 821; Pinnel's Case, 5 Co. 117 a; Maclary v. Reznor, 3 Del. Ch. 445. But see Bruton v. Wooten, 15 Ga. 570.

¹ Williams v. Stanton, 1 Root, 426; Blinn v. Chester, 5 Day, 359.

² Pinnel's Case, 5 Co. 117 a; Bull v. Bull, 43 Conn. 455; Arnold v. Park, 8 Bush, 3; McKenzie v. Culbreth, 66 N. C. 534.

³ Maddux v. Bevan, 39 Md. 485; Little v. Hobbs, 34 Maine, 357; Boyd v. Hitchcock, 20 Johns. 76; Le Page v. McCrea, 1 Wend. 164; Kellogg v. Richards, 14 Wend. 116; Gunn v. McAden, 2 Ire. Eq. 79; Mason v. Campbell, 27 Minn. 54; Singleton v. Thomas, 73 Ala. 205, 208. There are cases which put this upon the ground that to permit the creditor to sue the debtor would be a fraud on the surety and the other creditors. Steinman v. Magnus, 11 East,

390; Smith v. Bartholomew, 1 Met. 276, 278. See a similar principle in Poague v. Spriggs, 21 Grat. 220. See, also, Brooks v. White, 2 Met. 283; Goodnow v. Smith, 18 Pick. 414; Fellows v. Stevens, 24 Wend. 294; Keeler v. Salisbury, 33 N. Y. 648.

⁴ Sanders v. Branch Bank, 13 Ala. 353; Webb v. Goldsmith, 2 Duer, 413; Frisbie v. Larned, 21 Wend. 450; Booth v. Smith, 3 Wend. 66; Brooks v. White, 2 Met. 283; Brassell v. Williams, 51 Ala. 349, 352.

⁵ Guild v. Butler, 127 Mass. 386.

⁶ Pinnel's Case, 5 Co. 117 a; Schweider v. Lang, 29 Minn. 254; Arnold v. Park, 8 Bush, 3; Bowker v. Childs, 3 Allen, 434.

⁷ Pinnel's Case, supra; McKenzie v. Culbreth, 66 N. C. 534; Smith v. Brown, 3 Hawks, 580; Jones v. Bullitt, 2 Litt. 49; Fenwick v. Phillips, 3 Met. Ky. 87; Jones v. Perkins, 29 Missis. 139; Reid v. Hibbard, 6 Wis. 175. **Future Payment.**—One's own promissory note for a part of a sum due, payable at a future day, was in an old case held inadequate in satisfaction for the whole,

§ 55. **Composition with Creditors.**—If creditors, either all or two or more of them, agree with their debtor and with one another to accept a part of what he owes them severally in discharge of the whole, the forbearance of one is a benefit to another who might otherwise lose his whole debt, and it is a saving of expense to all; so that, on the execution of a compromise like this, though not under seal, the new agreement becomes a substitute for the old liabilities; and, so long as the debtor is in the performance of his part, he is protected from all further claims of those who have become parties to the arrangement.¹

§ 56. **Sum in Dispute — Unliquidated.**—If there is an unliquidated claim, or the sum due is in dispute, the payment of any agreed sum, or the promise to pay it, in full discharge, will be deemed to have proceeded on a sufficient consideration, and will be adequate.² A doctrine akin to this is —

§ 57. **Litigation — (Compromise).**—To settle or avoid litigation is an object of value. So that, if one whom another is in good faith pressing or suing, makes a promise on the strength of which the suit is forborne or withdrawn, he can be compelled to fulfil it; though it should be afterward shown, or the promisor knew at the time, that the demand was not well founded in law or in fact.³ And, in general terms, the com-

Cumber v. Wane, 1 Stra. 426. Yet recently, where a surety was added, this was adjudged sufficient. *Whitsett v. Clayton*, 5 Colo. 476. Possibly, under special circumstances, one might deem a promise to pay a smaller sum at a future time, especially when secured, preferable to a larger sum in ready money. To many an improvident man it might so prove. But this is chopping the logic of the law fine.

¹ *Good v. Cheesman*, 2 B. & Ad. 328; *Norman v. Thompson*, 4 Exch. 755; *Steinman v. Magnus*, 11 East, 390; *Boyd v. Hind*, 1 H. & N. 938, 3 Jur. n. s. 566; *Fellows v. Stevens*, 24 Wend. 294; *Pierce v. Jones*, 8 S. C. 273; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189; *Robert v. Barnum*, 80 Ky. 28; *Perkins v. Lockwood*, 100 Mass. 249; *Farring-*

ton v. Hodgdon, 119 Mass. 453; *Falconbury v. Kendall*, 76 Ind. 260. See *Lanes v. Squires*, 45 Texas, 382.

² *Simmons v. Almy*, 103 Mass. 33; *Stearns v. Johnson*, 17 Minn. 142; *Stewart v. Kershaw*, 52 Misso. 224; *Wehrum v. Kuhn*, 61 N. Y. 623; *Snow v. Grace*, 29 Ark. 131; *Palmerton v. Huxford*, 4 Denio, 166; *Taylor v. Nussbaum*, 2 Duer, 302; *Paxson v. Hewson*, 14 Philad. 174; *Bull v. Bull*, 43 Conn. 455; *Ruffner v. Hewitt*, 7 W. Va. 585; *Murphy v. United States*, 104 U. S. 464; *Berdell v. Bissell*, 6 Colo. 162; *Childs v. Millville, &c. Ins. Co.* 56 Vt. 609; *Whitney v. Cook*, 53 Missis. 551. And see *Sheldon v. Rice*, 30 Mich. 296.

³ *Bidwell v. Catton*, Hob. 216; *Cook v. Wright*, 1 B. & S. 559; *Ex parte Lucy*, 4 De G. M. & G. 356, 17 Jur. 1143;

promise, fairly obtained, of a right at the time doubtful, constitutes a valuable consideration, whatever a subsequent enlightenment may reveal concerning its validity.¹ The value consists in the release from an uncertain position with its anxieties, from apparent danger, and from inevitable expenses and trouble. Still, —

§ 58. **Limits.** — This doctrine runs close to another, from which it is not easily distinguishable in a way to reconcile all the cases. Manifestly, in legal reason, if the party setting up the claim did not act in good faith, the settlement is void for the fraud;² or, if the parties were under a mutual misapprehension of the facts, it is void for the mistake;³ so, also, it is void if obtained by threats or other like undue means.⁴ Looking at these and other principles in connection with the decisions, we may deem the true rule to be, that, where the claim is utterly destitute of foundation in law and fact, but this was not known to him who made his promise in settlement of it, thus negating any presumption of his having given the promise simply to avoid litigation, — or where there is any other circumstance excluding the case from the reasons controlling the last section, — there is no sufficient consideration, and the promise to pay is without effect.⁵ Also, if the compromise is, as in some circumstances it may be, in violation of public policy or law, it will be, within the principle about to be stated, void.⁶

§ 59. **Illegal — Against Public Policy.** — The courts, being

Warren v. Williamson, 8 Baxter, 427; 61 N. Y. 623; Troy v. Bland, 58 Ala. 197.

Little v. Allen, 56 Texas, 133; Parker v. Enslow, 102 Ill. 272; Longridge v. Dorville, 5 B. & Ald. 117; Wilkinson v. Byers, 1 A. & E. 106; Flannagan v. Kilcome, 58 N. H. 443; Jones v. Rittenhouse, 87 Ind. 348.

¹ Callisher v. Bischoffsheim, Law Rep. 5 Q. B. 449; Hund v. Geier, 72 Ill. 393; Honeyman v. Jarvis, 79 Ill. 318; Husband v. Epling, 81 Ill. 172; Cooke v. Murphy, 70 Ill. 96; Daffin v. Roberts, 9 Bradw. 103; Hindert v. Schneider, 4 Bradw. 203; Wray v. Chandler, 64 Ind. 146; Allen v. Bucknam, 75 Maine, 352; Wehrum v. Kuhn, 61 N. Y. 623; Troy v. Bland, 58 Ala. 197.

² Stewart v. Ahrenfeldt, 4 Denio, 189

³ Bell v. Gardiner, 4 Scott N. R. 621, 4 M. & G. 11; Southall v. Rigg, 11 C. B. 481, 15 Jur. 706; Forman v. Wright, 11 C. B. 481, 15 Jur. 707.

⁴ Bullene v. Blain, 6 Bis. 22.

⁵ Compare the cases cited to the last section with Davisson v. Ford, 23 W. Va. 617; Mulholland v. Bartlett, 74 Ill. 58; Ware v. Morgan, 67 Ala. 461; Seaman v. Seaman, 12 Wend. 381. And see post, § 70.

⁶ 1 Pars. Con. 440; Everingham v. Meighan, 55 Wis. 354.

established to conserve the law, good morals, and the due order of society, cannot lend their aid to parties conspiring to impede these objects. Therefore a consideration immoral, illegal, or contrary to public policy will not support a contract.¹ This topic will occupy a chapter further on.²

§ 60. **What concerns the Parties.** — If a consideration, however adequate in itself, in no way concerns the parties either personally or as representing the interests of others, — or, if it is procured neither by one of them nor by any other person in behalf of such one, — it will not support a contract.³ The common form of this doctrine is, that —

§ 61. **Benefit or Disadvantage.** — It must be something beneficial to the one party, or disadvantageous to the other, or to persons whom the parties represent.⁴ Thus, —

§ 62. **Extending Time.** — If one to whom another owes money simply promises him to extend the time of payment,

¹ *Tucker v. West*, 29 Ark. 386; *Taylor v. Chester*, Law Rep. 4 Q. B. 309; *Porter v. Jones*, 52 Misso. 399; *Harwood v. Knapper*, 50 Misso. 456; *Stoutenburg v. Lybrand*, 13 Ohio State, 228; *Sternburg v. Bowman*, 103 Mass. 325; *Bailey v. Bussing*, 28 Conn. 455; *Acheson v. Miller*, 2 Ohio State, 203; *Widoe v. Webb*, 20 Ohio State, 431; *Hennessey v. Hill*, 52 Ill. 281; *Pearce v. Brooks*, Law Rep. 1 Ex. 213; *Deans v. McLendon*, 30 Missis. 343; *Bly v. Second National Bank*, 29 Smith, Pa. 453; *Ives v. Bosley*, 35 Md. 262; *Brown v. Brine*, 1 Ex. D. 5.

² See also post, § 74, 467.

³ *Thomas v. Thomas*, 2 Q. B. 851, 859; *Simson v. Brown*, 68 N. Y. 355. And see *Stewart v. Hamilton College*, 2 Denio, 403; *Salmon v. Brown*, 6 Blackf. 347; *Bingham v. Kimball*, 17 Ind. 396; *Fugure v. Mutual Society*, 46 Vt. 362; *Philpot v. Gruninger*, 14 Wal. 570; *Page v. Becker*, 31 Misso. 466.

⁴ Ante, § 38, note; 1 Chit. Con. 11th Am. ed. 28; Met. Con. 163; *Edgeware H. Board v. Harrow Dist. Gas Co.* Law Rep. 10 Q. B. 92, 95, 96; *Currie v. Misa*, Law Rep. 10 Ex. 153, 162; *Buchanan v. International Bank*, 78 Ill. 500; *Cole-*

man v. Eyre, 45 N. Y. 38; *Glasgow v. Hobbs*, 32 Ind. 440; *Greene v. Bartholomew*, 34 Ind. 235; *Pitt v. Gentle*, 49 Misso. 74; *Williamson v. Clements*, 1 Taunt. 523; *Sanford v. Huxford*, 32 Mich. 313; *Neal v. Gilmore*, 29 Smith, Pa. 421; *Conover v. Stillwell*, 5 Vroom, 54; *McCarty v. Blevins*, 5 Yerg. 195; *Tompkins v. Philips*, 12 Ga. 52; *Molyneux v. Collier*, 17 Ga. 46; *Doyle v. Knapp*, 3 Scam. 334; *Warren v. Whitney*, 24 Maine, 561; *Hildreth v. Pinkerton Academy*, 9 Fost. N. H. 227; *Brown v. Brine*, 1 Ex. D. 5, 7; *Sands v. Crooke*, 46 N. Y. 564. Said Stanley, J. in *Flannagan v. Kilcome*, 58 N. H. 443: "A slight benefit conferred on the defendant, or the smallest injury or inconvenience, or risk of injury or inconvenience, suffered by the plaintiff, though neither the defendant nor any other person was benefited thereby, is enough." Referring also to *Sanborn v. French*, 2 Fost. N. H. 246, 248; *Davis v. Morgan*, 4 B. & C. 8; *Scotson v. Pegg*, 6 H. & N. 295; 1 Pars. Con. 431. And that actual benefit need not be realized, see *Bills v. Polk*, 4 Lea, 494; *Dyer v. McPhee*, 6 Colo. 174.

nothing passing between the parties as a consideration for this, the promise is void.¹ But if the debtor pays to his creditor the interest in advance,² or undertakes to pay an increased rate of interest,³ or gives him anything else of value,⁴ this, though the debt is fully due and payable, will sustain a promise fixing a day for paying it in the future. On the other hand, —

§ 63. **Same as a Consideration.** — A creditor's mere delay to sue his debtor is regarded either as a gift or as a thing of no value, unless there is an agreement for delay.⁵ But a forbearance pursuant to a promise, or even a mere promise to forbear, is sufficient to support an undertaking to do something else.⁶ An agreement to forbear in general terms means, for a reasonable time, and it is good;⁷ "for a short time," is too indefinite to have effect.⁸ Forbearance of a claim not valid in law is never a consideration;⁹ as, if one whose money

¹ Kellogg v. Olmsted, 25 N. Y. 189; Bates v. Starr, 2 Vt. 536; First National Bank v. Church, 3 Thomp. & C. 10; Van Allen v. Jones, 10 Bosw. 369; Parmelee v. Thompson, 45 N. Y. 58.

² Dickerson v. Ripley, 6 Ind. 128; Wright v. Bartlett, 43 N. H. 548; Williams v. Scott, 83 Ind. 405. And see Warner v. Campbell, 26 Ill. 282; Harbert v. Dumont, 3 Ind. 346.

³ Beckner v. Carey, 44 Ind. 89; Knapp v. Mills, 20 Texas, 123; Clarkson v. Creely, 35 Misso. 95; Smith v. Graham, 34 Mich. 302. See Kinsey v. Wallace, 36 Cal. 462.

⁴ Miller v. Gardner, 49 Iowa, 234; Smith v. School District, 17 Kan. 313.

⁵ Mecorney v. Stanley, 8 Cush. 85; Manter v. Churchill, 127 Mass. 31.

⁶ Hockenbury v. Meyers, 5 Vroom, 346; Mechanics, &c. Bank v. Wixson, 42 N. Y. 438; Cary v. White, 52 N. Y. 138; Underwood v. Hossack, 38 Ill. 208; Raymond v. Smith, 5 Conn. 555; Russell v. Babcock, 14 Maine, 138; Cook v. Duvall, 9 Gill, 460; Pennsylvania Coal Co. v. Blake, 85 N. Y. 226; Collins v. Barnes, 2 Norris, Pa. 15; Benner v. Van Norden, 27 La. An. 473; Newton v. Carson, 80 Ky. 309; Jasper v.

Tavis, 76 Misso. 13; Brownell v. Harsh, 29 Ohio State, 631; Morton v. Burn, 7 A. & E. 19; Gove v. Newton, 58 N. H. 359.

⁷ Glasscock v. Glasscock, 66 Misso. 627; Calkins v. Chandler, 36 Mich. 320; Payne v. Wilson, 7 B. & C. 423; Oldershaw v. King, 2 H. & N. 517, 3 Jur. n. s. 1152.

⁸ Lonsdale v. Brown, 4 Wash. C. C. 148; Sidwell v. Evans, 1 Pa. 383. It appears to be the doctrine, about which there may perhaps be some question on the authorities, that, if the promise to forbear is in general terms, yet too indefinite to satisfy the law, if the promisor does actually forbear for a reasonable time, this makes the consideration good. Howe v. Taggart, 133 Mass. 284, and the cases cited p. 287. This doctrine, rightly understood, appears just. Post, § 87. But it could in reason be applied only where the terms of the contract were such general ones as would include the forbearance actually rendered, not where they were precise and the particular forbearance was excluded by them.

⁹ Met. Con. 175; Loyd v. Lee, 1 Stra. 94; Leake Con. 625; Nispel v. Laparle, 74 Ill. 306.

has been stolen from a contractor for carrying the mail, forbears to sue him and takes his note on time, both mistakenly supposing there was a legal liability, the note cannot be collected.¹ In like manner, a creditor's promise not to institute proceedings in bankruptcy against his debtor will not support a third person's undertaking to pay the debt, if, contrary to the belief of the parties, such proceedings could not have been maintained.²

§ 64. **Gratuitous Bailment.** — One's promise to another to carry and deliver for him, to a third person, without compensation, an article of personal property, is void because there is no consideration for it.³ But if he takes the article into his possession, he is then under legal obligation to deliver it; because, should he keep it, he would derive a benefit to himself and cause a disadvantage to another, contrary to his promise.⁴

§ 65. **Good-will.** — The good-will of a business, though a mere right of a not very tangible sort, is often sold for money, and the law deems it a thing of value.⁵ Hence it is adequate as a consideration.⁶

§ 66. **Knowledge.** — The lawful communication of knowledge, of any sort, to one who seeks it, is a valuable consideration.⁷

¹ *Foster v. Metts*, 55 Missis. 77.

² *Ecker v. McAllister*, 54 Md. 362.

³ *Coggs v. Bernard*, 2 Ld. Raym. 909, 911, 919. And see *Elsee v. Gattward*, 5 T. R. 143; *Dartnall v. Howard*, 4 B. & C. 345.

⁴ The correctness of this doctrine is settled by the authorities beyond dispute, but the same reason (ante, § 12) is not always given as in the text. *Graves v. Ticknor*, 6 N. H. 537; *Colyar v. Taylor*, 1 Coldw. 372; *Beardslee v. Richardson*, 11 Wend. 25; *Bland v. Womack*, 2 Murph. 373; *Delaware Bank v. Smith*, Edm. Sel. Cas. 351; *Lloyd v. Barden*, 3 Strob. 343; *Clark v. Gaylord*, 24 Conn. 484; *Jenkins v. Motlow*, 1 Sneed, Tenn. 248; *Persch v. Quiggle*, 7 Smith, Pa. 247; *Gulledge v. Howard*, 23 Ark. 61; *Dart v. Lowe*, 5 Ind. 131;

Johnson v. Reynolds, 3 Kan. 257; *Coggs v. Bernard*, supra; *Met. Con.* 164-166, and cases there cited.

⁵ *Succession of Journe*, 21 La. An. 391; *Bradford v. Peckham*, 9 R. I. 250; *Hoyt v. Holly*, 39 Conn. 326; *Bozon v. Farlow*, 1 Meriv. 459; *Labouchere v. Dawson*, Law Rep. 13 Eq. 322; *Buckingham v. Waters*, 14 Cal. 146; *Dayton v. Wilkes*, 17 How. Pr. 510; *Williams v. Wilson*, 4 Sandf. Ch. 379.

⁶ *Smock v. Pierson*, 68 Ind. 405; *Bunn v. Guy*, 4 East, 190; *Heichew v. Hamilton*, 4 Greene, Iowa, 317; *Cruess v. Fessler*, 39 Cal. 336.

⁷ *Reed v. Golden*, 28 Kan. 632; *Williams v. United States*, 12 Ct. of Cl. 192; *Cates v. Bales*, 78 Ind. 285; *Huckins v. Second National Bank*, 47 Mich. 92.

§ 67. **Marriage** — changes the rights and relations of the parties to each other and to the community, hence it is a valuable consideration,—one of the best in the law to support any promise.¹ Yet, if a man has already agreed to marry a woman, her mere expectation that he will do it, nothing new passing between the parties, will not sustain a fresh promise from him.²

§ 68. **Old Contract for New.** — The cancelling of a contract, or the relinquishment of rights under it, is a valid consideration for entering into a new one.³ On this, among other grounds, the substitution of contracts is sustained.⁴

§ 69. **Other Illustrations** — might be added indefinitely. But, as each case must stand on its individual facts, always varying, and the principles already appear, they would be of little practical service.

§ 70. **Non-existence of Thing — Misapprehension.** — The non-existence, contrary to the belief of the parties, of that whereto the consideration relates, will render it ineffectual.⁵ For example, a deed supposed to convey land, but conveying nothing;⁶ forbearance, as just said, where the cause of action is without foundation in law;⁷ an obligation which the parties look upon as legal, but not so in truth, and the question not even doubtful;⁸ a patent apparently good, yet really void for

¹ 1 Bishop Mar. Women, § 775, 776; Wright v. Wright, 54 N. Y. 437; Wall v. Scales, 1 Dev. Eq. 476. A release from a contract to marry is a valuable consideration. Snell v. Bray, 56 Wis. 156.

² Raymond v. Sellick, 10 Conn. 480, 483.

³ Cutter v. Cochrane, 116 Mass. 408; post, § 768.

⁴ Rollins v. Marsh, 128 Mass. 116, 120; Little v. District of Columbia, 19 Ct. of Cl. 323; Thornton v. Guice, 73 Ala. 321; Marine, &c. Mining, &c. Co. v. Bradley, 105 U. S. 175; Farrar v. Toliver, 88 Ill. 408; Windham v. Doles, 59 Ga. 265; Shaffer v. McKanna, 24 Kan. 22; Perkins v. Hoyt, 35 Mich. 506; Lee v. Davis, 70 Ind. 464.

⁵ Gibson v. Pelhie, 37 Mich. 380;

The State v. Illyes, 87 Ind. 405; Rogers v. Walsh, 12 Neb. 28; Hopkins v. Hinkley, 61 Md. 584.

⁶ Murphy v. Jones, 7 Ind. 529. See Campbell v. Medbury, 5 Bis. 33; Frier-mood v. Rouser, 17 Ind. 461; Sheldon v. Harding, 44 Ill. 68; Ellery v. Cunningham, 1 Met. 112; Anderson v. Armstead, 69 Ill. 452; Curtis v. Clark, 133 Mass. 509. See Webster v. Laws, 89 N. C. 224.

⁷ Ante, § 63; Palfrey v. Portland, &c. Railroad, 4 Allen, 55, 57; Sharpe v. Rogers, 12 Minn. 174; Strahn v. Hamilton, 38 Ind. 57.

⁸ Logan v. Mathews, 6 Barr, 417; Jarvis v. Sutton, 3 Ind. 289. See Fleming v. Ramsey, 10 Wright, Pa. 252; Allen v. Prater, 30 Ala. 458; Ott v. Garland, 7 Misso. 28.

the want of novelty and utility;¹—these are specimens of apparent considerations, without substance, and therefore not adequate to support a promise.² If a suit on the promise is brought, the defence is based on what is termed a—

§ 71. **Failure of Consideration.**—For, if that for which the promise was made proves a nullity, the contract becomes void.³ Thus, a promissory note given for a warranted sewing-machine found to be worthless cannot be collected by the original holder.⁴ If, while the consideration is supposed to be valid, money is paid on the contract, it may on discovery of the invalidity be recovered back.⁵ And the like principle applies to things other than money.⁶ But,—

§ 72. **Defect known.**—If the parties are in no degree mistaken, and the thing is exactly what they supposed it to be,—and there is no fraud,—the law, not undertaking to interfere with their bargain, will hold the consideration to be good.⁷ For example, if at a public sale it is announced that only such a person's interest in the thing is to be disposed of, and that if he has no interest the purchaser will get none, an entire

¹ *First National Bank v. Peck*, 8 Kan. 660; *Bierce v. Stocking*, 11 Gray, 174; *Lester v. Palmer*, 4 Allen, 145; *Cross v. Huntley*, 13 Wend. 385; *Geiger v. Cook*, 3 Watts & S. 266; *Vaughan v. Porter*, 16 Vt. 266; *Clough v. Patrick*, 37 Vt. 421; *Dickinson v. Hall*, 14 Pick. 217; *Albright v. Teas*, 10 Stew. Ch. 171.

² For other illustrations see *Hocker v. Gentry*, 3 Met. Ky. 463; *Wentworth v. Wentworth*, 5 N. H. 410; *Cabot v. Haskins*, 3 Pick. 83; *Long v. Towl*, 42 Misso. 545; *Ehle v. Judson*, 24 Wend. 97; *Crosby v. Wood*, 2 Selden, 369; *Woods v. Schlater*, 24 La. An. 284; *Strong v. Courtney*, 6 Mod. 265.

³ *Dodge v. Oatis*, 27 Kan. 762; *Sorrells v. McHenry*, 38 Ark. 127; *Montelius v. Wood*, 56 Iowa, 254; *Powell v. Subers*, 67 Ga. 448; *Jeffries v. Lamb*, 73 Ind. 202; *Jones v. Hathaway*, 77 Ind. 14; *Stockmeyer v. Weidner*, 32 La. An. 106; *House v. Kendall*, 55 Texas, 40; *Simpson Centenary College v. Bryan*, 50 Iowa, 293; *Snyder v. Kurtz*, 61 Iowa, 593.

⁴ *Thompson v. Wheeler, &c. Manuf. Co.* 29 Kan. 476. On the like principle, *Lathrop v. Hickson*, 67 Ga. 445.

⁵ Met. Con. 219; Add. Con. 7th Eng. ed. 232; 2 Chit. Con. 11th Am. ed. 921; *Chapman v. Brooklyn*, 40 N. Y. 372; *Foss v. Richardson*, 15 Gray, 303; *Darst v. Brockway*, 11 Ohio, 462; *Spring v. Coffin*, 10 Mass. 31; *Wharton v. O'Hara*, 2 Nott & McC. 65; *Pettibone v. Roberts*, 2 Root, 258; *Steele v. Hobbs*, 16 Ill. 59; *Woodward v. Fels*, 1 Bush, 162; *Griggs v. Morgan*, 9 Allen, 37; *Hotchkiss v. Judd*, 12 Allen, 447; *Leach v. Tilton*, 40 N. H. 473; *Putnam v. Westcott*, 19 Johns. 73; *Rice v. Peet*, 15 Johns. 503; *Smith v. McCluskey*, 45 Barb. 610; *French v. Millard*, 2 Ohio State, 44.

⁶ *Essery v. Cowlard*, 26 Ch. D. 191.

⁷ *Haigh v. Brooks*, 10 A. & E. 309; *Pollard v. Lyman*, 1 Day, 156; *Foy v. Haughton*, 85 N. C. 168; *Carson v. Kelley*, 57 Texas, 379.

failure of title will not lift from the buyer the obligation to pay what he agreed.¹ And, where parties are mutually cognizant of a doubt as to a title, if one of them, in exchange for the other's promise to pay an agreed sum, executes to him a release, the promise can be enforced though it is ascertained that there was no title.² *A fortiori* —

§ 73. **Matter Subsequent.** — A subsequent depreciation in the value of the thing, or its failure, does not constitute an available failure of consideration.³ So it was where, during slavery, persons bought⁴ or hired⁵ slaves, their promises to pay were not rendered void by emancipation. And a note given to the mother of a bastard child, in discharge of an obligation for its support, remains good though the child dies.⁶ Or if, after a patent is sold on credit, improvements are made by which it becomes valueless, this is no defence to a suit for the purchase-money.⁷

§ 74. **Partial Failure of Consideration — Unlawful in Part.** — Where the consideration for an indivisible promise is in part something done in violation of law⁸ and in remainder some lawful thing, the promise cannot find support on the lawful part without resting also on the unlawful, and the whole will be void.⁹ But if there are two promises, the one founded on the unobjectionable in the consideration and the other on the evil, the former will be sustained and the latter will fail.¹⁰ For example, a note given in settlement of an account containing lawful charges and charges for liquor sold in violation of a statute cannot be collected;¹¹ but, before the settlement, the creditor might have separated the items, and enforced

¹ *Ellis v. Adderton*, 88 N. C. 472.

² *Kerr v. Lucas*, 1 Allen, 279; *Fay v. Richards*, 21 Wend. 626.

³ *Smith v. Gower*, 2 Duvall, 17; *Perry v. Buckman*, 33 Vt. 7; *Byrne v. Cummings*, 41 Missis. 192; *Gore v. Mason*, 18 Maine, 84; *Kerchner v. Gettys*, 18 S. C. 521; *Smock v. Pierson*, 68 Ind. 405; *Blackman v. Dowling*, 63 Ala. 304; *Daniel v. Tarver*, 70 Ga. 203.

⁴ *Dowdy v. McLellan*, 52 Ga. 408.

⁵ *Taylor v. Mayhew*, 11 Heisk. 596; *Topp v. White*, 12 Heisk. 165.

⁶ *Potter v. Earnest*, 45 Ind. 416.

⁷ *Harmon v. Bird*, 22 Wend. 113.

⁸ *Ante*, § 57.

⁹ *McBratney v. Chandler*, 22 Kan. 692; *Tenney v. Foote*, 95 Ill. 99; *Barton v. Port Jackson, &c. Plank Road*, 17 Barb. 397.

¹⁰ *Bishop Stat. Crimes*, § 1030.

¹¹ *Perkins v. Cummings*, 2 Gray, 258; *Covington v. Threadgill*, 88 N. C. 186; *Cotten v. McKenzie*, 57 Missis.

payment for the lawful.¹ Where there is a failure of a part of a lawful consideration, the reasoning is different. The part which failed was simply a nullity, it imparted no taint to the residue. Hence, in such a case, no particular amount of consideration being required,² the promise may be enforced.³ At the same time the defendant may have suffered damages in respect of the part of the consideration which failed, and so be entitled to his cross-action against the plaintiff, or to recoup the damages, or maintain a set-off, or rescind the whole contract; and, in the last case, return what of value he received, and treat the consideration as having altogether failed. Often there is an election of methods. All this could not be profitably explained except to a reader familiar with the entire law of contracts and with the proceedings in courts. It is deemed best, therefore, not to pursue the subject further in this place; reserving the rest for other connections.⁴

§ 75. **Oral Proof of Consideration.** — In principle, there is a distinction between what the parties mutually undertake to do, and the cause — or consideration — which moves them to the undertaking. So, in practice, if they set down their promises in writing, the terms expressing them are carefully worded; but the part which states the consideration as often varies from the real truth as otherwise. Therefore the consideration expressed in a written contract ought to be open to inquiry by oral evidence. The better doctrine holds it to be so.⁵ Such evidence in no degree modifies that to which

¹ Chase v. Burkholder, 6 Harris, Pa. 48.

² Ante, § 45.

³ Cotten v. McKenzie, 57 Missis. 418; Franklin v. Miller, 4 A. & E. 599, 605; Juchter v. Boehm, 63 Ga. 71; Case v. Grim, 77 Ind. 565; Hodgdon v. Golder, 75 Maine, 293, 295. Such is the general rule, and the cases supporting it are innumerable. But where a father made a compromise with a turnpike company, releasing it from all liability for injuries both to himself and to his minor son, and receiving in return the company's promise to pay him a gross sum, it was

held that he could maintain no action on the agreement; because the father's release did not bar the son's claim, and it was impossible to discern what part of the sum was due to the father. Green v. Perkins, 3 Lea, 491. See also Torinus v. Buckham, 29 Minn. 128.

⁴ For a citation of many cases on the topic, and some helpful suggestions, see 1 Pars. Con. 462-467; Met. Con. 216, 219, 220.

⁵ Farnsworth v. Boardman, 131 Mass. 115; Holmes's Appeal, 29 Smith, Pa. 279; Wilkinson v. Scott, 17 Mass. 249, 257; Kinzie v. Penrose, 2 Scam. 515;

they give their mutual consent.¹ This doctrine may on special grounds require some partial exceptions in particular cases,² and there are decisions more or less adverse.³ But by what is deemed the just view, limited only in ways not affecting the mass of cases, the reason of the rule which forbids oral evidence to control a written instrument does not extend to the consideration for a promise embodied in it, therefore the rule itself does not.⁴

II. *Where the Contract is wholly executory, as depending on Mutual Promises.*

§ 76. **What.** — The only case of a contract wholly executory — that is, executory on both sides — is where there are —

Mutual Promises. — A promise of a thing of value is itself valuable when made on a consideration; so that, if two persons simultaneously promise, each to the other, some valu-

Rockhill v. Spraggs, 9 Ind. 30; Jones v. Jones, 12 Ind. 389; Lawton v. Buckingham, 15 Iowa, 22; Emmons v. Littlefield, 13 Maine, 233; Kumler v. Ferguson, 7 Minn. 442; Morris Canal, &c. Co. v. Ryerson, 3 Dutcher, 457; Wooden v. Shotwell, 3 Zab. 465; Jack v. Dougherty, 3 Watts, 151; Curry v. Lyles, 2 Hill, S. C. 404; Holbrook v. Holbrook, 30 Vt. 432; Hannah v. Wadsworth, 1 Root, 458; Strawbridge v. Cartledge, 7 Watts & S. 394; Brown v. Summers, 91 Ind. 151; Kennedy v. Goodman, 14 Neb. 585; Huebsch v. Scheel, 81 Ill. 281; Bragg v. Stanford, 82 Ind. 234; Taylor v. Wightman, 51 Iowa, 411; The State v. Gott, 44 Md. 341; Altringer v. Capeheart, 68 Misso. 441.

¹ Stufflebeem v. Arnold, 57 Cal. 11.

² Post, § 275; McConnell v. Brayner, 63 Misso. 461; Connor v. Follansbee, 59 N. H. 124.

³ Murphy v. Mobile Branch Bank, 16 Ala. 90; Morse v. Shattuck, 4 N. H. 229; Schemerhorn v. Vanderheyden, 1 Johns. 139; Emery v. Chase, 5 Greenl. 232. Where the expression is, "for divers other good considerations," the real

consideration may be shown. Johnson v. Boyles, 26 Ala. 576. "Value received," Osgood v. Bringolf, 32 Iowa, 265.

⁴ Ely v. Wolcott, 4 Allen, 506, 507; Peacock v. Monk, 1 Ves. Sen. 127; Llanelly Railway, &c. v. London, &c. Railway, Law Rep. 7 H. L. 550, 556, 8 Ch. Ap. 942; Goward v. Waters, 98 Mass. 596, 599; Kirkham v. Boston, 67 Ill. 599; Coggeshall v. Coggeshall, 1 Strob. 43; Arms v. Ashley, 4 Pick. 71; Attix v. Pelan, 5 Iowa, 336; Tingley v. Cutler, 7 Conn. 291; Mouton v. Noble, 1 La. An. 192; Cummings v. Dennett, 26 Maine, 397; Patchin v. Swift, 21 Vt. 292; Thompson v. Blanchard, 3 Comst. 335; Long v. Davis, 18 Ala. 801; Pettibone v. Roberts, 2 Root, 258; Smith v. Brooks, 18 Ga. 440; Herrick v. Bean, 20 Maine, 51; Newton v. Jackson, 23 Ala. 335; Marsh v. Lisle, 34 Missis. 173; Warren v. Walker, 23 Maine, 453; Haynes v. Rogillio, 20 La. An. 238; Collier v. Mahan, 21 Ind. 110; Aurora v. Cobb, 21 Ind. 492; Swope v. Forney, 17 Ind. 385; Burrill v. Saunders, 36 Maine. 409.

able thing, this constitutes a good contract. The promise of the one is the consideration for that of the other.¹ It is so even though the promise of the one is oral while that of the other is in writing;² or of the one is express while the other's is implied.³ And if parties mutually agree to postpone the time for the performance of a contract, this is effectual, the promise of the one being a consideration for that of the other.⁴ But —

§ 77. **By one only.** — A promise by one, with nothing in return, is void;⁵ as, if he undertakes in writing to convey land to another who neither agrees to buy nor pays anything for the promise,⁶ or to remain with and learn a trade of another who does not agree to teach.⁷

§ 78. **Both bound or neither.** — A common method of entering into this contract is for one person to make an offer to another; then, if the latter accepts it, the contract becomes thereby perfected.⁸ And, unless both are bound, so that an action could be maintained by either against the other for a breach, neither will be bound.⁹ This proposition is absolutely axiomatic, not admitting of being overthrown by authorities, so long as the law requires something of value as a consideration;¹⁰ for, where it is admitted that there is nothing for A's promise to rest on but B's promise, if B has not promised

¹ *Funk v. Hough*, 29 Ill. 145; *Downey v. Hinchman*, 25 Ind. 453; *Phillips v. Preston*, 5 How. U. S. 278; *Leach v. Keach*, 7 Iowa, 232; *Rippey v. Friede*, 26 Misso. 523; *Hartzell v. Saunders*, 49 Misso. 433; *Coleman v. Eyre*, 45 N. Y. 38; *Nunnally v. White*, 3 Met. Ky. 584; *Babcock v. Wilson*, 17 Maine, 372; *Whitehead v. Potter*, 4 Ire. 257; *Appleton v. Chase*, 19 Maine, 74; *Byrd v. Fox*, 8 Misso. 574; *Congregational Society v. Perry*, 6 N. H. 164; *George v. Harris*, 4 N. H. 533; *Briggs v. Sizer*, 30 N. Y. 647; *Forney v. Shipp*, 4 Jones, N. C. 527; *Nott v. Johnson*, 7 Ohio State, 270; *Abrams v. Suttles*, *Busbee*, 99; *Barringer v. Warden*, 12 Cal. 311; *Missisquoi Bank v. Sabin*, 48 Vt. 239; *Winberry v. Koonce*, 83 N. C. 351.

² *Dicken v. Morgan*, 54 Iowa, 684.

³ *Jones v. Binford*, 74 Maine, 439.

⁴ *McNish v. Reynolds*, 14 Norris, Pa. 483.

⁵ *Thorne v. Deas*, 4 Johns. 84.

⁶ *Bean v. Burbank*, 16 Maine, 458; *Burnet v. Bisco*, 4 Johns. 235; *Mers v. Franklin Ins. Co.* 68 Misso. 127.

⁷ *Lees v. Whitcomb*, 5 Bing. 34, 2 Moore & P. 86, 3 Car. & P. 289. And see *Booth v. Fitzer*, 82 Ind. 66.

⁸ *Goodpaster v. Porter*, 11 Iowa, 161; *Thomason v. Dill*, 30 Ala. 444; *Boies v. Vincent*, 24 Iowa, 387.

⁹ *Stiles v. McClellan*, 6 Colo. 89; *Townsend v. Fisher*, 2 Hilton, 47; *Ewins v. Gordon*, 49 N. H. 444. And see *Jenkins v. Williams*, 16 Gray, 158; post, § 318.

¹⁰ *Ante*, § 41, 45.

A's promise rests on nothing, and is void. There may be cases in seeming contradiction to this; if there are any really so, they are not to be followed. In one case, parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filled; then made another, which was declined; and on suit brought the defendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly it stood, in law, as a mere continuing offer by the defendant; but, when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff; Brett, J., observing, that this case "does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice."¹ So, in the proper place, we shall see that a contract by mutual promises, between an adult and a minor, is binding on the adult; but that is because the minor's promise is only voidable, and his right to recede is a personal privilege.

§ 79. **Simultaneous.** — If the promise of each is made at a different time from that of the other, though on the same day, and the two are not connected, both are void. In form or effect they must be simultaneous.² Still, as we have just seen, a long time may in mere form intervene between the promises; as, where a standing offer is made by the one party, then months afterward it is accepted by the other. Here, in legal effect, the promises became simultaneous on the latter day.

III. *Where the Contract is wholly executed.*

§ 80. **In General.** — One's first impression of a contract fully executed on both sides is, that it is ended, and no questions concerning it remain. But, on reflection, we see that the rights, relations, and responsibilities of the parties are

¹ Great Northern Railway v. Witham, Law Rep. 9 C. P. 16, 20. 583; Keep v. Goodrich, 12 Johns. 397; Tucker v. Woods, 12 Johns. 190; James

² Livingston v. Rogers, 1 Caines, v. Fulcrod, 5 Texas, 512.

changed, in degrees and ways differing with the varying circumstances. For example, property has been acquired or lost, a new executory contract has been created by the law, creditors have been invested with new rights, the status of the parties is altered, or something else has been done or suffered; so that, though the contract is in a sense ended, in another and most important sense it remains. The particular explanations will in the main be given in other connections, but something should be added in this place.

§ 81. **Without Consideration.**—Though a contract is without consideration, yet, if it is voluntarily and with full knowledge of the facts executed, the property in the thing, whether money or a chattel, is transferred, and it cannot be reclaimed.¹ So that a consideration is not an essential part of an executed contract;² yet, where the claims of creditors intervene, the want of it may, as to them, be important.³ A common illustration is a —

§ 82. **Gift — (Delivery).**—A mere promise of a thing to one is void for want of consideration, and words of present gift are only a promise.⁴ But when the promise is executed by the delivery of the thing, the imperfection in the contract of gift is cured, and the thing cannot be reclaimed.⁵ And,—

§ 83. **Under Seal without Delivery.**—As delivery is not essential to a sale of personal property where no rights of third persons are concerned;⁶ so it is not to a gift,

¹ *Matthews v. Smith*, 67 N. C. 374; *Newell v. March*, 8 Ire. 441; *Hubbard v. Hickman*, 4 Bush, 204.

² *Maxwell v. Graves*, 59 Iowa, 613.

³ *Iles v. Cox*, 83 Ind. 577; *Tuttle v. Turner*, 28 Texas, 759; *Kerrigan v. Rautigan*, 43 Conn. 17; *Cothran v. Forsyth*, 68 Ga. 560.

⁴ *Brewer v. Harvy*, 72 N. C. 176; *Irons v. Smallpiece*, 2 B. & Ald. 551; *Madison v. Shockley*, 41 Iowa, 451; *Morse v. Low*, 44 Vt. 561; *Pearson v. Pearson*, 7 Johns. 26; *Phelps v. Pond*, 23 N. Y. 69; *Thompson v. Dorsey*, 4 Md. Ch. 149; *Johnson v. Stevens*, 22 La. An. 144; *Spencer v. Vance*, 57 Misso. 427; *Reeves v. Capper*, 5 Bing. N. C. 136, 6

Scott, 877; *Bourne v. Fosbrooke*, 18 C. B. N. s. 515, 11 Jur. N. s. 202.

⁵ *Faxon v. Durant*, 9 Met. 339; *Camp's Appeal*, 36 Conn. 88; *Succession of De Pouilly*, 22 La. An. 97; *Rockwood v. Wiggin*, 16 Gray, 402; *Gardner v. Merritt*, 32 Md. 78; *Ellis v. Secor*, 31 Mich. 185; *Smith v. Smith*, 7 Car. & P. 401; *Bond v. Bunting*, 28 Smith, Pa. 210; *Marsh v. Fuller*, 18 N. H. 360; *Hillebrant v. Brewer*, 6 Texas, 45; *Little v. Willets*, 55 Barb. 125, 37 How. Pr. 481; *Payne v. Powell*, 5 Bush, 248.

⁶ *McCoy v. Moss*, 5 Port. 88; *Visher v. Webster*, 13 Cal. 58; *Sidwell v. Lobly*, 27 Ill. 438; *Ingersoll v. Kendall*, 13 Sm.

if made by a writing under seal, which imports a consideration.¹

§ 84. **Other Illustrations** — might be added, but these will make sufficiently plain the main doctrine of the sub-title; namely, that no consideration is necessary in an executed contract.

IV. *Where the Contract is executed in part.*

§ 85. **New Consideration.** — If a contract, imperfect for want of consideration, is in part executed, — then, if the contract is renewed on sufficient consideration, — the past as well as the future is thereby made secure.² Thus, —

§ 86. **Past and Future Support.** — An undertaking to pay for the support of a child, both past and future, in consideration of a promise to continue the child's nurture, is binding as to board already furnished equally as to future board.³ Again, —

§ 87. **Validated by Part Execution.** — A contract is often such that, until something is done under it, the consideration is imperfect, yet a partial performance, or complete performance on one side, supplies the defect.⁴ If, for example, one promises another, who makes no promise in return, to pay him money when he shall have done a specified thing, if he does it, not only is the contract executed on one side, but also the consideration is perfected, and payment can be enforced.⁵ And, in more general terms, when for any cause the party from whom the consideration moves is not compellable to render it, if he does render it, the contract becomes thereby perfected.⁶ On this principle, one's voluntary promissory

& M. 611; Burt v. Dutcher, 34 N. Y. 493; Hooban v. Bidwell, 16 Ohio, 509; Ludwig v. Fuller, 17 Me. 162; post, § 1309.

¹ McCutchen v. McCutchen, 9 Port. 650; Irons v. Smallpiece, 2 B. & Ald. 551, 552; Horn v. Gartman, 1 Fla. 63; Hannon v. The State, 9 Gill, 440. See Butler v. Scofield, 4 J. J. Mar. 139; Gordon v. Wilson, 4 Jones, N. C. 64; McEwen v. Troost, 1 Sneed, Tenn. 186; Abbot v. Williams, 2 Brev. 38.

² Met. Con. 201; Loomis v. Newhall, 15 Pick. 159; Andrews v. Ives, 3 Conn. 368.

³ Wiggins v. Keizer, 6 Ind. 252.

⁴ See, for a helpful illustration, ante, § 78.

⁵ Andreas v. Holcombe, 22 Minn. 339; Miller v. McKenzie, 95 N. Y. 575.

⁶ Storm v. United States, 94 U. S. 76. Guilford Methodist Ep. Par. v. Clarke,

note, given to aid in the construction of a railroad, is, when the road is built and in operation, no longer voluntary, but on a valuable consideration.¹

V. *Where the Consideration is executed.*

§ 88. **Connection of Consideration and Promise.** — For the consideration and promise to depend each on the other, so as together to constitute a contract, there must obviously be the proper connection between them. If, in the cases just stated, the thing done to complete the consideration were some act having no relation to the promise, it would have no effect; so, on the other hand, if the promise lacks the proper relation to the consideration, there will be no contract. Thus, —

§ 89. **Gift not a Consideration.** — One who has made a gift of a thing to another cannot go back on his own act and compel payment.² Therefore what has been given, or otherwise voluntarily paid, or transferred, with full knowledge of the facts, without expectation of anything in return, as already explained,³ or with no legal liability assumed at the time on the other side, can be no consideration for a fresh promise.⁴ Hence, —

§ 90. **Past Consideration.** — It has become established, as general doctrine, requiring such qualifications as its reasons indicate, that a past and executed consideration will not sustain a promise.⁵ For example, it is a debtor's duty to pay his debt promptly on its becoming due, so that forbearance by the creditor is a consideration for an agreement between the parties.⁶ But after the day of payment has gone by, and the creditor has forborne, this thing of the past is no consideration for a fresh promise.⁷ And where those necessities which

74 Maine, 110; *Birdsall v. Birdsall*, 52 Wis. 208.

¹ *Wright v. Irwin*, 35 Mich. 347; *Stevens v. Corbitt*, 33 Mich. 458.

² *University v. McNair*, 2 Ire. Eq. 605.

³ Ante, § 52, 56-58, 70, 72, 82.

⁴ *Watson v. Dunlap*, 2 Cranch C. C. 14; *Bulkley v. Landon*, 2 Conn. 404; *Eastwood v. Kenyon*, 11 A. & E. 438.

⁵ Ante, § 79; *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick. 159; *Barlow v. Smith*, 4 Vt. 139; *Comstock v. Smith*, 7 Johns. 87; *Tomlinson v. Smith*, 2 Iowa, 39; *Snow v. Hix*, 54 Vt. 478.

⁶ Ante, § 63.

⁷ *Shealy v. Toole*, 56 Ga. 210. And see *Young v. Hill*, 67 N. Y. 162.

ordinary paternal duty requires a father to supply have been sold to a minor son solely on the credit of the latter, it now becomes impossible for the father, by a mere promise, to bind himself to the seller to pay for them.¹ But, —

§ 91. **At Request.** — If the thing done was at the request of the promisor, it will sustain the promise;² because, as the reader perceives, though the request, the doing, and the promise may have been on different days, or even in different years, the whole thus becomes one transaction. And, —

§ 92. **Implied Request.** — Where the evidence or circumstances do not clearly show that the executed consideration was a gratuity, or was something else which cast no legal obligation on the promisor, and out of which the law created no promise, the jury under direction of the court may infer, as of fact or of law, a previous request, to satisfy the justice of the particular case.³ Of course, —

§ 93. **Previous Obligation.** — If, under the circumstances, the law had created a promise when the consideration passed,⁴ — as, if a benefit had been conferred on the promisor and accepted, with no evidence of its being a gratuity,⁵ — or, if the promise is made in discharge of any subsisting legal obligation, however it may have originated in some prior transaction,⁶ —

¹ *Freeman v. Robinson*, 9 Vroom, 383. See also *Bestor v. Roberts*, 58 Ala. 331.

² *Hunt v. Bate*, 3 Dy. 272 a; *Lamp-leigh v. Brathwait*, Hob. 105; *Carson v. Clark*, 1 Scam. 113; *Comstock v. Smith*, 7 Johns. 87; *Allen v. Woodward*, 2 Fost. N. H. 544; *Alcinbrook v. Hall*, 2 Wils. 309; *Tappin v. Broster*, 1 Car. & P. 112.

³ *Oatfield v. Waring*, 14 Johns. 188; *Hicks v. Burhans*, 10 Johns. 243; *Wilson v. Edmonds*, 4 Fost. N. H. 517; *Doty v. Wilson*, 14 Johns. 378.

⁴ *Exall v. Partridge*, 8 T. R. 308.

⁵ Post, § 210; *Seymour v. Marlboro*, 40 Vt. 171; *Kenan v. Holloway*, 16 Ala. 53.

⁶ *Beadle v. Whitlock*, 64 Barb. 287; *Jennings v. Brown*, 12 Law J. n. s. Ex. 86 (which compare with *Beaumont v.*

Reeve, 8 Q. B. 483); *Allen v. Davison*, 16 Ind. 416; *Maurer v. Mitchell*, 9 Watts & S. 69; *Spaulding v. Crawford*, 27 Texas, 155; *Cook v. Bradley*, 7 Conn. 57; *Bailey v. Bussing*, 29 Conn. 1; *Merrick v. Bank of the Metropolis*, 8 Gill, 59; *Swift v. Crocker*, 21 Pick. 241; *Warner v. Booge*, 15 Johns. 233; *Bel-fast v. Leominster*, 1 Pick. 123, 127. In *Beaumont v. Reeve*, supra, Lord Denman, C. J., at p. 487, said: "An express promise cannot be supported by a consideration from which the law could not imply a promise, except where the express promise does away with a legal suspension or bar of a right of action which, but for such suspension or bar, would be valid;" adding: "This result we arrived at, after much deliberation, and we now adhere to it." See *Runnamaker v. Cordray*, 54 Ill. 303.

the consideration will require no previous request to make it adequate; though, in mere form of technical pleading, such an allegation may be necessary.¹

VI. *The Waiver of Imperfections in the Consideration.*

§ 94. **Waiving Legal Rights in General.** — The doctrine is familiar, that no man is compellable to stand on a right which the law gives him. He can always waive it, if he chooses. And the rule applies equally to a right conferred by the common law, by a statute, and by a written constitution.² Therefore, —

§ 95. **Bar of Statute of Limitations.** — If the right to sue upon a violated contract is barred by the Statute of Limitations, the delinquent may waive this defence.³ One method of waiver is to neglect to plead the statute when sued.⁴ But the common method, which is sufficient, is by an express promise to pay, or by such an acknowledgment of present indebtedness as implies a promise.⁵ On this principle, it is no defence to an agreement to pay the note of a third person, that the Statute of Limitations has fully run against the note.⁶ A conditional promise will suffice; but, in this case, the debt

¹ Met. Con. 193 et seq.

² 1 Bishop Crim. Law, § 995-1007;
¹ Bishop Crim. Proceed. I. § 117-126.

³ The doctrine is not always put on these reasons. Ante, § 12. But the views in the text accord, if not with the language of the modern decisions, with the decisions themselves. The old notion, that the lapse of the statutory period creates a presumption of payment, consequently that payment will be enforced whenever this presumption is rebutted by the evidence, is exploded. A late English writer, speaking of these and the other like cases, says: "The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection." Leake Con. 317. And he cites *Earle v. Oliver*, 2 Exch. 71, 90;

Flight v. Reed, 1 H. & C. 703, 713, 716; note to *Wennall v. Adney*, 3 B. & P. 247, 249. Among American decisions, see *Shepard v. Rhodes*, 7 R. I. 470. See post, § 1350-1367.

⁴ 1 Saund. Wms. ed. 283, notes; 2 Ib. 63 a, note.

⁵ *Chasemore v. Turner*, Law Rep. 10 Q. B. 500, 14 Eng. Rep. 304, and *Moak's* note at p. 326; *Johns v. Lantz*, 13 Smith, Pa. 324; *Georgia Ins. Co. v. Ellicott*, Taney, 130; *Chambers v. Rubey*, 47 Misso. 99; *Simonton v. Clark*, 65 N. C. 525; *Harper v. Fairley*, 53 N. Y. 442; *Tanner v. Smart*, 6 B. & C. 603; *Norton v. Colby*, 52 Ill. 198. See *Shapley v. Abbott*, 42 N. Y. 443; *Beardsley v. Hall*, 36 Conn. 270.

⁶ *Amonett v. Montague*, 75 Misso. 43.

can be recovered only on the plaintiff's showing that the condition has been fulfilled.¹ Again, —

§ 96. **Bankruptcy, &c.** — If a debt is discharged under bankruptcy or insolvency laws, the debtor, by a promise to pay it, waives the benefit of those laws, and payment may be compelled.² The old consideration sustains the debt;³ and the better reasoning conducting to this result is, that no consideration is required to make valid a promise to waive a privilege which the law has tendered. But the promise must be distinct and unequivocal;⁴ yet the message, "tell him I intend to pay him," has been adjudged sufficient.⁵ Like the promise under the Statute of Limitations, it may be conditional.⁶ While the old liability remains, — that is, before the bankrupt's discharge, — the law's tender to him of protection from suit not having been made, his waiver, it has been held, is premature; the fresh promise, to be binding, must be given after the discharge.⁷ One's mere promise to pay another's debt barred in bankruptcy, even his father's, cannot be enforced.⁸ Once more, —

§ 97. **Indorser — Demand and Notice.** — An indorser of a note or bill, who is released from liability by the holder's neglecting demand and notice, may waive this advantage. And he does waive it if he promises payment with full knowledge of the facts.⁹ In short, —

¹ Meyerhoff v. Froehlich, 3 C. P. D. 333, 4 C. P. D. 63; post, § 1364.

² Penn v. Bennet, 4 Camp. 205; Trueman v. Fenton, Cowp. 544; Roberts v. Morgan, 2 Esp. 736; Lang v. Mackenzie, 4 Car. & P. 463; Williams v. Dyde, Peake, 68; Besford v. Saunders, 2 H. Bl. 116; Fleming v. Hayne, 1 Stark. 370; Lerow v. Wilmarth, 7 Allen, 463; Williams v. Bugbee, 6 Cush. 418; Fitzgerald v. Alexander, 19 Wend. 402; Kenyon v. Worsley, 2 R. I. 341; Baltimore, &c. Railroad v. Clark, 19 Md. 509; Smith v. Richmond, 19 Cal. 476; Earnest v. Parke, 4 Rawle, 452; Scouton v. Eislord, 7 Johns. 36; Turner v. Chrisman, 20 Ohio, 332; Farm-

ers, &c. v. Flint, 17 Vt. 508; Kull v. Farmer, 78 N. C. 339.

³ Second Nat. Bank v. Wood, 59 N. H. 407.

⁴ McDougall v. Page, 55 Vt. 187.

⁵ Hubbard v. Farrell, 87 Ind. 215.

⁶ Lanier v. Tolleson, 20 S. C. 57.

⁷ Ogden v. Redd, 13 Bush, 581.

⁸ McElven v. Sloan, 56 Ga. 208.

⁹ Sigerson v. Mathews, 20 How. U. S. 496; Thornton v. Wynn, 12 Wheat. 183; Ladd v. Kenney, 2 N. H. 340; Arnold v. Dresser, 8 Allen, 435; Low v. Howard, 10 Cush. 159; First National Bank v. Crittenden, 2 Thomp. & C. 118; Bogart v. McClung, 11 Heisk. 105, 119.

§ 98. **Any Bar tendered by the Law** — may be waived by a promise of payment.¹ But, —

§ 99. **Release by Party.** — If the party, claiming under a contract, or to whom a debt is due, voluntarily, for a sufficient consideration, or under seal with no consideration in fact, releases his claim, the obligation thus released will not support a fresh promise of payment, nor is it in any way revived thereby.² And this rule extends to all things resting on the agreement of the parties.³ In this class of cases, unlike the others, the law has not tendered to the party an advantage, which he may therefore waive; but, by the act of the parties, the contract or debt has ceased to exist. There is nothing to waive.⁴

§ 100. **Contrary Opinions.** — Contrary to this view, there are some cases,⁵ not very recent, which put a release under seal, where no actual consideration for it passes, on the same ground as a discharge in bankruptcy; holding, as to both, that the new promise revives the debt, not as a waiver of a legal right, but on the now exploded doctrine of a moral obligation.⁶

§ 101. *The Doctrine of this Chapter restated.*

In morals, one who by a promise creates an expectation is required to make the expectation good.⁷ And, if we look into the reason, we find the case not essentially different from a class of legal ones in which there is deemed to be a consideration.⁸ The promise was a gift, which indeed the promisor was under no duty to make; but, having made it, he has

¹ *Stebbins v. Crawford*, 11 Norris, Pa. 289; *Anspach v. Brown*, 7 Watts, 139.

² *Hale v. Rice*, 124 Mass. 292.

³ *Dunham v. Johnson*, 135 Mass. 310; *Davis v. German Am. Ins. Co.* 135 Mass. 251.

⁴ *Valentine v. Foster*, 1 Met. 520; *Montgomery v. Lampton*, 3 Met. Ky. 519; *Warren v. Whitney*, 24 Maine, 561; *Snevily v. Read*, 9 Watts, 396.

⁵ *Willing v. Peters*, 12 S. & R. 177 (perhaps overruled by *Snevily v. Read*, 9 Watts, 396); *Stafford v. Bacon*, 25 Wend. 384.

⁶ *Ante*, § 44; *Stebbins v. Crawford*, 11 Norris, Pa. 289; *Edwards v. Nelson*, 51 Mich. 121; *McElven v. Sloan*, 56 Ga. 208.

⁷ *Ante*, § 39; *Paley Moral Phil.* b. 3, pt. 1, c. 5.

⁸ *As, for example, ante*, § 42, 52, 64, 65.

morally no more right to reclaim it than to take back any other delivered gift.¹ If he does reclaim it, he inflicts a mental wrong, and often a pecuniary one also. The promisee may have so acted on the promise that the withdrawal of it will be his ruin.² Still, as the law of the land cannot redress all wrongs, it is doubtless wise in requiring a pecuniary consideration for the promises it consents to enforce. Anything, however small, which the law esteems of value, is an adequate consideration; but a thing without legal value is not.³ Thus it is with executory contracts, being those which the law enforces. But an executed contract, which the parties have voluntarily carried out, requires, for its collateral and resulting consequences, no consideration.

§ 102. The rest of the chapter consists of applying these propositions to the various questions which arise in practice. The following is a convenient way to test the executory contract. Assume that the law, when called upon to enforce this contract, requires value for value; also that, except where it has ordained the values of things, as of money, fees, and the like, the parties in making their contract may place their own values upon them, with the single limitation that they must be things to which it accords some value. This formula is somewhat technical, but it may be reasoned upon in methods not technical, after the ordinary reasoning of mankind.⁴ And, when the result of the reasoning discloses a *quid pro quo*, the contract is to be pronounced good, otherwise when none is thus shown.

¹ Ante, § 82, 89.

² Ante, § 39.

³ Ante, § 41, 45.

⁴ Ante, § 9, 12, 14, 15.

CHAPTER IV.

CONTRACTS UNDER SEAL.

§ 103. Introduction.

104-118. In General.

119-127. The Consideration.

128-138. High Nature and Consequences.

139. Doctrine of Chapter restated.

§ 103. **How Chapter divided.** — We shall consider these contracts as to; I. In General; II. The Consideration; III. Their High Nature and its Consequences.

I. *In General.*

§ 104. **Meanings.** — The principal terms denoting contracts under seal are —

Specialty. — Any contract under seal is a specialty, or special contract, in distinction from a simple or parol one.¹ The meaning of the word² is of late sometimes extended to include judgments;³ but there is no exigency in the language requiring it, and the correctness of the extended meaning has well been denied.⁴

§ 105. **Deed.** — In the strict sense, the word “deed” is substantially the equivalent of specialty.⁵ It signifies, says Coke, “an instrument consisting of three things, namely, writing, sealing, and delivery; comprehending a bargain or contract

¹ 2 Bl. Com. 464, 465, and Chitty's notes; *Benson v. Benson*, 1 P. Wms. 130, 131; *Marriott v. Thompson*, Willes, 186, 189; *Laidley v. Bright*, 17 W. Va. 779; *Seymour v. Street*, 5 Neb. 85; *Bank of United States v. Donnally*, 8 Pet. 361, 371.

² Ante, § 25.

³ *Seymour v. Street*, supra.

⁴ *Kimball v. Whitney*, 15 Ind. 280.

⁵ 2 Bl. Com. ut sup.; *Benson v. Benson*, 1 P. Wms. 130, 131; *Reg. v. Morton*, Law Rep. 2 C. C. 22; *Master v. Miller*, 4 T. R. 320, 345.

between party and party, man or woman.”¹ But its actual use is oftener limited to a sealed conveyance of real estate, either absolute² or in mortgage.³ A deed from one to another, who does not join in it, is called a deed-poll.⁴ An —

§ 106. **Indenture** — is a deed in which two or more persons join in mutual covenants.⁵ The term —

§ 107. **Covenant** — ordinarily denotes a sealed instrument;⁶ or, more frequently, a particular promise under seal, as when we speak of the “covenants in a deed.”⁷ And so a promise under seal to pay rent is a covenant.⁸ But this word does not in every connection, or so certainly as the words just mentioned, imply a seal.⁹ A —

§ 108. **Bond** — is an instrument under seal whereby one acknowledges himself indebted to another in a specified sum, generally but not necessarily conditioned for the performance of some act.¹⁰

§ 109. **Obligation — Writing Obligatory.** — Each of these terms commonly implies a seal;¹¹ but it does not always, or

¹ Co. Lit. 171 b; 2 Bishop Crim. Law, § 567.

² Wood v. Owings, 1 Cranch, 239; Van Eps v. Schenectady, 12 Johns. 436; Ketchum v. Evertson, 13 Johns. 359, 363; Parker v. McAllister, 14 Ind. 12.

³ Bishop Stat. Crimes, § 340; People v. Caton, 25 Mich. 388; Herron v. Herron, 91 Ind. 278.

⁴ 2 Bl. Com. 296.

⁵ 2 Bl. Com. 295, 296; Van Santwood v. Sandford, 12 Johns. 197; Hopewell v. Amwell, 1 Halst. 169; Englefield's Case, 4 Leon. 169, 175; Cabell v. Vaughan, 1 Saund. Wms. ed. 291, note 1. These authorities appear distinct to the proposition that this word necessarily implies a seal. But see, contra, Magee v. Fisher, 8 Ala. 320.

⁶ Toml. Law Dict. Covenant; McVoy v. Wheeler, 6 Port. 201; Davis v. Judd, 6 Wis. 85; Robbins v. Ayres, 10 Misso. 538; Benson v. Benson, 1 P. Wms. 130, 131.

⁷ Leake Con. 143.

⁸ Greenleaf v. Allen, 127 Mass. 248.

⁹ 1 Saund. Wms. ed. 291, note; Van Santwood v. Sandford, 12 Johns. 197; Hayne v. Cummings, 16 C. B. n. s. 421; Hays v. Lasater, 3 Pike, 565. See Graves v. Smedes, 7 Dana, 344.

¹⁰ Wood v. Willis, 110 Mass. 454; Bouv. Law Dict. Bond; United States v. Linn, 15 Pet. 290, 311. See People v. Mead, 24 N. Y. 114. “A bond containing such acknowledgment simply is called a single bond; but there may be appended to it a condition that upon the performance of a certain act the bond is to be void, otherwise to remain in full force, and it is then called a bond with a condition.” Leake Con. 143, 144. It is believed that, by the better opinion, the word necessarily imports a seal, but there are cases to the contrary. For a collection of authorities, see Abbott Law Dict. Bond.

¹¹ Toml. Law Dict. Bond; Cantey v. Duren, Harper, 434; Taylor v. Glaser, 2 S. & R. 502; Denton v. Adams, 6 Vt. 40; Deming v. Bullitt, 1 Blackf. 241; Skinner v. McCarty, 2 Port. 19; Harman v. Harman, Bald. 129; Harden

by all opinions.¹ In various connections, the word "obligation" does not even import a writing; as, where we say one is under obligation to do a thing.

§ 110. **Specialty defined.**—A contract under seal, or specialty, is an undertaking in writing, made solemn by the seal of the party. It must be, not on wood,² or, adds Coke, on "leather, cloth, or the like, but only upon parchment or paper; for," he continues, "the writing upon them can be least vitiated, altered, or corrupted."³

§ 111. **What the Seal.**—The seal is an impression on any impressible substance adhering to the paper. It was wax in early times; but a wafer is as good, and so is any other tenacious material on which an impression is made.⁴ Or, by what is believed to be the better opinion, it may be embossed on the paper itself.⁵ By statutes or judicial decisions in a part of our States, not all, even a scroll formed with the pen, or the word "seal," written or printed, if employed as a seal, is adequate.⁶ But the existence on an instrument of a seal, if not meant for such, does not make it a specialty;⁷ nor can there be a specialty without some sort of seal.⁸ Yet a court with equity powers may treat as sealed a writing executed as such by the parties, where it is plain the omission of the seal was by mistake.⁹ And where a statute calls for a sealed

v. Webster, 29 Ga. 427; *Clark v. Phillips*, Hemp. 294.

¹ *Stone v. Bradbury*, 14 Maine, 185; *Hargroves v. Cooke*, 15 Ga. 321.

² *Pollock Con.* 129; *Smith Con.* 2d Eng. ed. 5.

³ *Co. Lit.* 35 b.

⁴ *Tasker v. Bartlett*, 5 Cush. 359; *Warren v. Lynch*, 5 Johns. 239; *Beardsley v. Knight*, 4 Vt. 471; *Gillespie v. Brooks*, 2 Redf. 349; *Richard v. Boller*, 6 Daly, 460; *Hendrix v. Boggs*, 15 Neb. 469.

⁵ *Pierce v. Indseth*, 106 U. S. 546, 549. *Contra*, *Coit v. Millikin*, 1 Denio, 376; *Bank of Rochester v. Gray*, 2 Hill, N. Y. 227; *Farmers & Manuf. Bank v. Haight*, 3 Hill, N. Y. 493.

⁶ *Underwood v. Dollins*, 47 Misso. 259; *Groner v. Smith*, 49 Misso. 318,

322; *Cromwell v. Tate*, 7 Leigh, 301; 4 Kent Com. 453; *Courand v. Vollmer*, 31 Texas, 397; *Norvell v. Walker*, 9 W. Va. 447; *Lewis v. Overby*, 28 Grat. 627; *Burton v. Le Roy*, 5 Saw. 510; *Green v. Lake*, 2 Mackey, 162.

⁷ *Clement v. Gunhouse*, 5 Esp. 83; *Add. Con.* 7th Eng. ed. 20; *Blackwell v. Hamilton*, 47 Ala. 470.

⁸ *The State v. Thompson*, 49 Misso. 188; *Vance v. Funk*, 2 Scam. 263; *Chilton v. People*, 66 Ill. 501; *The State v. Humbird*, 54 Md. 327.

⁹ *Rutland v. Paige*, 24 Vt. 181; *McCarley v. Tippah Supervisors*, 58 Misso. 483; *Wadsworth v. Wendell*, 5 Johns. Ch. 224. See *Brinkley v. Bethel*, 9 Heisk. 786; *Arnold v. Nye*, 23 Mich. 286. "It has been settled, upon fundamental principles of equity juris-

instrument, then requires it to be judicially approved, the approval, followed by acting under it, estops inquiry, and the objection is then too late.¹ There should properly be a separate seal for every signature; yet in strict law one seal, or scroll where it constitutes a seal, will answer for any number of signers, if each adopts it as his own.²

§ 112. **Signing.** — One executing a specialty commonly signs it, the same as an instrument not sealed. But the signing was early held not to be necessary, where the party puts upon the parchment his seal; for the seal creates the deed.³ There is probably no modern authority contrary to this early doctrine, which seems still to prevail.⁴

§ 113. **Delivery.** — An instrument, to be a deed, must, like any other written contract, be delivered;⁵ not merely as an escrow, but absolutely.⁶ Thereupon it takes effect.⁷

§ 114. **Date and Place.** — It need have no date;⁸ it is even good with an impossible one, or one differing from the fact.

prudence, by many precedents of high authority, that, when the seal of a party, required to make an instrument valid and effectual at law, has been omitted by accident or mistake, a court of chancery, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed, or by restraining the setting up of the want of it to defeat a recovery at law." Gray, J. in *Bernards v. Stebbins*, 109 U. S. 341, 349, referring to *Smith v. Ashton*, Freem. Ch. 308, Cas. temp. Finch, 273; *Cockerell v. Cholmeley*, 1 Russ. & Myl. 418, 424; *Montville v. Haughton*, 7 Conn. 543, and other cases cited in this note; also *Wiser v. Blachly*, 1 Johns. Ch. 607; *Green v. Morris*, &c. Railroad, 1 Beas. 165, 2 McCarter, 469; *Druiff v. Parker*, Law Rep. 5 Eq. 131.

¹ *Whitney v. Coleman*, 9 Daly, 238. See *United States v. Hodson*, 10 Wal. 395.

² *Tasker v. Bartlett*, *supra*; *Ball v.*

Dunsterville, 4 T. R. 313; *Norvell v. Walker*, 9 W. Va. 447; *Northumberland v. Cobleigh*, 59 N. H. 250; *Burnett v. McCluey*, 78 Misso. 676; *New Orleans, &c. Railroad v. Burke*, 53 Missis. 200; *Pickens v. Rymer*, 90 N. C. 282; *The State v. Spartanburg, &c. Railroad*, 8 S. C. 129.

³ *Cromwell v. Grunsden*, 2 Salk. 462; *Smith Con.* 2d Eng. ed. 5.

⁴ *Cooch v. Goodman*, 2 Q. B. 580; *Jeffery v. Underwood*, 1 Pike, 108; *Taunton v. Pepler*, 6 Madd. 166; *Ex parte Hodgkinson*, 19 Ves. 291, 296; *Wright v. Wakeford*, 17 Ves. 454 a, 459; *Saunders v. Hackney*, 10 Lea, 194.

⁵ Post, § 349-361.

⁶ 4 Kent Com. 454; *Smith Con.* 2d Eng. ed. 6; 1 Chit. Con. 11th Am. ed. 4; *Cannon v. Cannon*, 11 C. E. Green, 316; *Hawkes v. Pike*, 105 Mass. 560; *Watkins v. Nash*, Law Rep. 20 Eq. 262.

⁷ *Browne v. Burton*, 5 Dowl. & L. 289, 2 Bail Court, 220.

⁸ *McMichael v. Carlyle*, 53 Wis. 504.

Its date in law is that of the delivery. Nor need it mention the place where executed.¹

§ 115. **Form of Words.** — As in other instruments, the form of words is immaterial if the meaning is distinct.² Even —

Foreign Language. — It is not made ill by being written in a foreign language.³ Thus also, —

§ 116. **Name of Obligor.** — It is the correct and common form to place the name of the obligor in the body of the instrument; yet, if it is not there, or if it is there and differs from the name signed, it will be good.⁴ But, —

§ 117. **Uncertain.** — If the obligee or grantee is uncertain,⁵ or if otherwise the meaning cannot be sufficiently ascertained, the instrument will be void.⁶ An abbreviation in the name may be explained by oral evidence.⁷

§ 118. **Elsewhere.** — A part of the foregoing propositions are common to all written contracts, by reason of which they will be more fully explained in other connections.

II. *The Consideration.*

§ 119. **General Rule.** — Except as about to be stated, a sealed instrument is binding in a court of law, though no consideration is mentioned in it, and though there is none in fact. The seal is said to import a consideration, and to estop the party from denying it.⁸ But, —

¹ Anonymous, 7 Mod. 38; Willion v. Berkley, 1 Plow. 223, 231; Dodson v. Kayes, Yelv. 193; Cromwell v. Grimsdale, Comb. 477; s. c. nom. Cromwell v. Grunsden, 2 Salk. 462, 1 Ld. Raym. 335; Pierce v. Richardson, 37 N. H. 306; Fournier v. Cyr, 64 Maine, 32; Armote v. Bream, Holt, 212; Goddard's Case, 2 Co. 4 b, 3 Leon. 100; Add. Con. 7th Eng. ed. 18. See post, § 178.

² Taylor v. Preston, 29 Smith, Pa. 436; Bedow's Case, 1 Leon. 25; Cromwell v. Grimsdale, 12 Mod. 193; Dobson v. Keys, Cro. Jac. 261; s. c. nom. Dodson v. Kayes, Yelv. 193; Saunders v. Hanes, 44 N. Y. 353; Wood v. Copper Miners Co. 7 C. B. 906.

³ Parker v. Rennaday, Cro. Jac. 208.

⁴ Williams v. Greer, 4 Hayw. 235, 239; Smith v. Crooker, 5 Mass. 538; Fournier v. Cyr, 64 Maine, 32, 35; Ex parte Fulton, 7 Cow. 484; Partridge v. Jones, 38 Ohio State, 375.

⁵ Douthitt v. Stinson, 63 Misso. 268.

⁶ Worthington v. Hylyer, 4 Mass. 196, 205; Swain v. Ransom, 18 Johns. 107; post, § 316, 390.

⁷ Aultman, &c. Manuf. Co. v. Richardson, 7 Neb. 1.

⁸ Ante, § 51, 83; Harris v. Harris, 23 Grat. 737; Van Valkenburgh v. Smith, 60 Maine, 97; Sharington v. Strotton, 1 Plow. 298, 309; Page v. Trufant, 2 Mass. 159, 162; Fallows v. Taylor, 7

§ 120. **In Equity.** — Though a court of equity holds this general doctrine; and so, for example, will not relieve against a bond on the mere ground that it is without consideration,¹ and though it will presume a consideration from a seal;² yet, on the other hand, it will not interfere with its special remedies, such as to aid a defective conveyance of land,³ or decree specific performance of a covenant to convey,⁴ where there was no consideration in fact.⁵ Again, —

§ 121. **Illegal — Fraud, &c. — Inquiring into.** — If the sealed undertaking is to do a thing unlawful, or against public policy or morals, or if the unexpressed consideration for it is in fact thus tainted, or if it was obtained by fraud or duress, the seal will not serve as a screen for the wrong; but the real nature of the transaction, though it does not appear on the face of the instrument, may be shown, and a party may avail himself of this matter, the same as though there were no seal.⁶ And the general doctrine, that we may look into the real consideration of a written contract, already explained,⁷ applies as well to sealed contracts as to others.⁸ If

T. R. 475; *Cooch v. Goodman*, 2 Q. B. 580, Denman, C. J. observing, "that a covenant, being under seal, does not by law require any consideration to support it; and, though an illegal consideration may be shown, and will vitiate it, and if a consideration be stated on the face of a deed a different one may be proved in order to raise a legal defence, yet a mere failure of consideration which once existed may have no more effect than a total want of consideration in the first instance," p. 599; *Douglass v. Howland*, 24 Wend. 35; *Burkholder v. Plank*, 19 Smith, Pa. 225; *Mack's Appeal*, 18 Smith, Pa. 231; *Wing v. Peck*, 54 Vt. 245; *The State v. Gott*, 44 Md. 341.

¹ Jenk. Cent. 109.

² *Northern Kansas Town Co. v. Oswald*, 18 Kan. 336.

³ Anonymous, 12 Mod. 603.

⁴ *Lister v. Hodgson*, Law Rep. 4 Eq. 30, 36; *Jefferys v. Jefferys*, Craig & P. 138; *Keffer v. Grayson*, 76 Va. 517. And see *James v. Bydder*, 4 Beav. 600,

5 Jur. 1076; *Holloway v. Headington*, 8 Sim. 324; *Downs v. Porter*, 54 Texas, 59.

⁵ Leake Con. 147, 608, 609; post, § 124. But see *Jones v. Jones*, 6 Conn. 111.

⁶ Cases cited ante, § 119; also *Smith Con.* 2d Eng. ed. 12-16; *Logan v. Plummer*, 70 N. C. 388; *Mitchell v. Reynolds*, 10 Mod. 130, 134; *Hodson v. Ingram*, Aleyn, 60; *Hacket v. Tilly*, 11 Mod. 93; *Beawfage's Case*, 10 Co. 99 b; *Carpenter v. Beer*, Comb. 246; *Burkholder v. Plank*, 19 Smith, Pa. 225; *Reniger v. Fogossa*, 1 Plow. 1, 19; *Hazard v. Irwin*, 18 Pick. 95, 106; *Obert v. Hammel*, 3 Harrison, 73; *Iles v. Cox*, 83 Ind. 577; *Thorn v. Thorn*, 51 Mich. 167; *Cothran v. Forsyth*, 68 Ga. 560; *Hogdon v. Green*, 56 Iowa, 733.

⁷ Ante, § 75.

⁸ *The State v. Gott*, 44 Md. 341; *Altringer v. Capeheart*, 68 Misso. 441, 444; *Clifford v. Turrell*, 1 Y. & Col. C. C. 138, 9 Jur. 633; *Pique v. Arendale*, 71 Ala. 91; *Huebsch v. Scheel*, 81 Ill. 281.

the law were not so, the seal "would," in the words of Lord Ellenborough, "be made a cover for every species of wickedness and illegality."¹ Thus, —

§ 122. **Compounding.** — A bond, the real consideration for which is, though not stated, that the obligee will not appear against another in a criminal cause, will be held void on the fact appearing.² Or, —

§ 123. **Unlawful Arrest.** — If one gives a bond to procure his discharge from an unlawful arrest, the consideration and duress may be shown, whereupon it will be adjudged void.³

§ 124. **Exceptional Reasons** — may require a consideration, contrary to the general rule. The principal and perhaps only specialties within this exception are —

Conveyances of Land. — It was an early doctrine under the Statute of Uses, that, in the words of Coke, "an use cannot be raised by any covenant or proviso, or by bargain and sale, upon a general consideration;" "for it doth not appear to the court that the bargainer hath *quid pro quo*, and the court ought to judge whether the consideration be sufficient or not, and that cannot be when it is alleged in such generality."⁴ A somewhat different expression of the doctrine is, that, by the rules of the equity tribunals, which had the sole jurisdiction of uses before the statute, a use could not be enforced without a consideration,⁵ and the statute made legal only what before existed in equity.⁶ It became, therefore, and still remains a rule of law that, in conveyances which derive their force from the Statute of Uses, the seal does not supersede the necessity of a consideration otherwise appearing.⁷ And these comprehend most of the conveyances commonly em-

¹ Paxton v. Popham, 9 East, 408, 421. See Hartshorn v. Day, 19 How. U. S. 211, 222.

² Collins v. Blantern, 2 Wils. 341; Goudy v. Gebhart, 1 Ohio State, 262.

³ Bowker v. Lowell, 49 Maine, 429; Greathouse v. Dunlap, 3 McLean, 303.

⁴ Mildmay's Case, 1 Co. 175 a, 176 a; and see the notes, with the authorities collected, by Thomas.

⁵ Ante, § 120.

⁶ Hudson v. Alexander, 3 Johns. 484, 488, 491.

⁷ Smith Con. 2d Eng. ed. 12; Springs v. Hanks, 5 Ire. 30; Bolton v. Carlisle, 2 H. Bl. 259; Sargent v. Reed, 2 Stra. 1228, 1229; 1 Chit. Pl. 8th Am. ed. 366; 2 Ib. 576 et seq.; Thomas's note to 1 Co. 176 a; Allen v. Florence, 16 Johns. 47; 3 Washb. Real Prop. 4th ed. 368.

ployed in our States.¹ But we have seen that on this exception the law has engrafted another as to the nature of the consideration; for, while a simple executory contract to be enforced must proceed on a "valuable" consideration, that of the executed deed of conveyance of lands may, in a family arrangement, and as between the parties, be simply "good," — to be set aside, in proper cases, in favor of third persons with superior claims.² The consideration, whether valuable or merely good, must, by the general doctrine, either be set down in the deed or, if suit is brought, be proved, but the latter alone will suffice in the absence of the former.³ Still there may be a conveyance valid as between the parties without any, even the "good," consideration in fact.⁴ The result of which reasoning appears to be, that, for a gift of land neither in family settlement nor to a relative of the grantee to be effectual, the deed must in form recite a valuable consideration, which still may be a mere fiction.⁵ And such would seem to be the doctrine of some courts,⁶ but others hold that no consideration need be even expressed.⁷ The statutes and decisions differ so much in our States⁸ that it is deemed best to leave the question here, with no further attempt even to cite authorities, but with the caution to the practitioner to look for himself into the law of his own State.

§ 125. **Conveyances of Chattels** — are not governed by the

¹ *Hudson v. Alexander*, supra; *Wallis v. Wallis*, 4 Mass. 135; *Parker v. Nichols*, 7 Pick. 111; *Gale v. Coburn*, 18 Pick. 397, 400; *Horton v. Sledge*, 29 Ala. 478; *Platt v. Brown*, 30 Conn. 336.

² Ante, § 42, 43; *Gully v. Exeter*, 10 B. & C. 584, 606.

³ *Goodtitle v. Petto*, 2 Stra. 934; *Mildmay's Case*, 1 Co. 175 a, 176 a.

⁴ 4 Kent Com. 465; *Fouty v. Fouty*, 34 Ind. 433; *Shaw v. Bran*, 1 Stark. 319.

⁵ **Estoppel**. — To such a deed it appears the doctrine would, as between the parties, well apply, that evidence contradicting the consideration will not be received to defeat the deed. *Clarkson v. Hanway*, 2 P. Wms. 203; *McConnell v.*

Brayner, 63 Misso. 461; *Richardson v. Clow*, 8 Bradw. 91; post, § 275.

⁶ *Howell v. Delancey*, 4 Cow. 427; *Saunders v. Cadwell*, 1 Cow. 622; *Grout v. Townsend*, 2 Hill, N. Y. 554, 557; *Coxe v. Sartwell*, 9 Harris, Pa. 480.

⁷ *Rogers v. Hillhouse*, 3 Conn. 398; *Randall v. Ghent*, 19 Ind. 271; *Croft v. Bunster*, 9 Wis. 503. See *Peacock v. Monk*, 1 Ves. Sen. 127.

⁸ Compare *Huston v. Markley*, 49 Iowa, 162; *Warren v. Tobey*, 32 Mich. 45; *Mason v. Moulden*, 58 Ind. 1; *McCrea v. Purmort*, 16 Wend. 460; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Ford v. Ellingwood*, 3 Met. Ky. 359; *Pennington v. Gittings*, 2 Gill & J. 208.

real-estate rules. So, in them, a seal imports a consideration, and none need be either expressed or shown in evidence.¹

§ 126. **In Restraint of Trade.** — A contract in restraint of trade is, in general, void as against public policy.² It is equally so, therefore, whether under seal or by parol.³ But a partial restraint, which operates to divide the field of trade between different persons, is in many circumstances unobjectionable, and the agreement for it good, if on such valuable consideration as shows the restraint to be reasonable.⁴ Therefore, as there must be, not merely a seal, but a consideration in fact, such consideration must appear in the writing equally whether under seal or not.⁵ So are the authorities; still, if, distinguishing the consideration from the covenants or promises,⁶ we conclude that the consideration need not appear in an ordinary agreement in writing, we may carry the reasoning to the result that, in the present case, it will be sufficient if appearing in the averments and proofs at the trial. And this we have seen, on authority, to be the rule as to the consideration in a deed of land.⁷ Finally, —

§ 127. **Local Usage or Statute.** — “By local usage in some of the States of the Union, and by statute in others, the want or failure of consideration is a valid defence to a suit on a sealed contract;”⁸ or, the seal is reduced to mere presumptive evidence of a consideration.⁹ In some other States a seal is by statute rendered always unnecessary, so that an instrument without seal is equally effectual with a sealed one.¹⁰

¹ *Bunn v. Winthrop*, 1 Johns. Ch. 329.

² Post, § 513-520.

³ *Alger v. Thacher*, 19 Pick. 51; *Saratoga County Bank v. King*, 44 N. Y. 87, 91; *Allsopp v. Wheatcroft*, Law Rep. 15 Eq. 59.

⁴ *Mitchel v. Reynolds*, 1 P. Wms. 181, 10 Mod. 27, 85; *Gunmakers v. Fell*, Willes, 384; *Smith* Con. 2d Eng. ed. 133; *Davis v. Mason*, 5 T. R. 118, 120.

⁵ 1 Chit. Pl. 8th Am. ed. 366; Met. Con. 2, 233; *Tomlinson v. Dighton*, 1 P. Wms. 149, 156, 157; *Mallan v. May*, 11 M. & W. 653, 665.

⁶ Ante, § 75.

⁷ Ante, § 124.

⁸ Met. Con. 161, 162; *Pierce v. Wright*, 33 Texas, 631; *Greathouse v. Dunlap*, 3 McLean, 303; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Stovall v. Barnett*, 4 Litt. 207; 1 Pars. Con. 6th ed. 429; *Ring v. Kelly*, 10 Misso. Ap. 411.

⁹ *Campbell v. Tompkins*, 5 Stew. Ch. 170; *Aller v. Aller*, 11 Vroom, 446.

¹⁰ *McKinney v. Miller*, 19 Mich. 142, 151.

III. *The High Nature of the Specialty and its Consequences.*

§ 128. **What the Doctrine.** — An instrument under seal is deemed by the law of a higher nature than one not sealed. Therefore, —

§ 129. **Merger.** — If the parties to a simple contract enter into one on the same matter under seal, the former is merged in and extinguished by the latter.¹ And it is immaterial whether they intended this consequence or not; for, said Maule, J., “one cannot have, in respect of the same demand, a coexisting remedy, by proceeding both on covenant and on simple contract.”² But the mere giving, under seal, of security for a simple-contract debt, and incidentally acknowledging it, does not elevate it to a specialty;³ if, beyond this, the covenant embraces also a promise to pay, the simple contract is merged and extinguished.⁴ Always, for the specialty to have this effect, it must be coextensive with the simple contract, and between the same parties.⁵ Again, —

§ 130. **Varied or abrogated.** — It is said in the older cases, and repeated in many of the modern ones, that a specialty cannot be varied or abrogated by words not under seal;⁶ “for every contract or agreement ought to be dissolved by matter of as high a nature as the first deed.”⁷ On the other hand, the exact reverse has been laid down as the better present doctrine.⁸ The old rule is certainly not now followed with-

¹ 1 Chit. Con. 11th Am. ed. 9; Smith Con. 2d Eng. ed. 19; Robbins v. Ayres, 10 Misso. 538; Banorgue v. Hovey, 5 Mass. 11; Rhoads v. Jones, 92 Ind. 328. See Witbeck v. Waine, 16 N. Y. 532; Charles v. Scott, 1 S. & R. 294.

² Price v. Moulton, 10 C. B. 561, 15 Jur. 228, 229.

³ Marryat v. Marryat, 28 Beav. 224, 6 Jur. n. s. 572; Holmes v. Bell, 3 Man. & G. 213, 3 Scott, N. R. 479; Twopenny v. Young, 3 B. & C. 208.

⁴ Saunders v. Milsome, Law Rep. 2 Eq. 573.

⁵ Boaler v. Mayor, 19 C. B. n. s. 76; Sharpe v. Gibbs, 16 C. B. n. s. 527.

⁶ Rutland's Case, 5 Co. 25 b; Parker v. Ramsbottom, 5 D. & R. 138, 3 B. & C. 257; Miller v. Hemphill, 4 Eng. 488; Harper v. Hampton, 1 Har. & J. 622; Delacroix v. Bulkley, 13 Wend. 71; Sinaud v. Patterson, 3 Blackf. 353; Thompson v. Brown, 1 Moore, 358, 7 Taunt. 656; Rogers v. Payne, 2 Wils. 376; Neal v. Sheaffield, Cro. Jac. 254; Vaughn v. Ferris, 2 Watts & S. 46; Perry v. Clymore, 3 McCord, 245; Hume v. Taylor, 63 Ill. 43; Chapman v. McGrew, 20 Ill. 101; Barnett v. Barnes, 73 Ill. 216.

⁷ Rutland's Case, *supra*.

⁸ Canal Co. v. Ray, 101 U. S. 522, 527.

out modifications,¹ if, indeed, it ever was. Descending to particulars, the common and reasonable course of the adjudications is that —

§ 131. **No Consideration — Parol License.** — A mere verbal license, which passes without consideration, to one to do a thing contrary to his covenant will not avail the doer in defence of an action on the covenant.² But, —

§ 132. **Accord and Satisfaction.** — As a specialty undertaking can be performed without seal, so also without seal there can be accord and satisfaction of it.³ And, —

§ 133. **Modify.** — By oral or written words founded on a consideration, if plain in intent and terms, a sealed contract may be modified without seal.⁴ Yet, as the new part, or modification, is not a specialty, and what remains of the old part has ceased to be the perfected agreement to which the seal was attached, and has become merged in the unsealed provisions, the whole is now to be treated as one parol contract.⁵ In like manner, —

§ 134. **Discharged.** — For a valuable consideration, the specialty may, before breach, the same as after, be discharged by the mutual parol agreement of the parties,⁶ — a proposition substantially the same as before laid down.⁷ *A fortiori*, —

§ 135. **Rescind by Executed Parol.** — If a parol agreement rescinding a specialty is fully executed, it will be effectual.⁸ Again, —

¹ Herzog v. Sawyer, 61 Md. 344, 352; White v. Walker, 31 Ill. 422.

² West v. Blakeway, 2 Man. & G. 729; Chapman v. McGrew, 20 Ill. 101. See Farley v. Thompson, 15 Mass. 18.

³ Alden v. Blague, Cro. Jac. 99; Gilson v. Stewart, 7 Watts, 100; Parker v. Ramsbottom, 3 B. & C. 257, 271, 272. And see Moody v. Leavitt, 2 N. H. 171; Lawall v. Rader, 2 Grant Pa. 426; Reed v. McGrew, 5 Ohio, 375, 381.

⁴ Canal Co. v. Ray, 101 U. S. 522; Robinson v. Bullock, 66 Ala. 548; Fleming v. Gilbert, 3 Johns. 528; Cooke v. Murphy, 70 Ill. 96; Le Fevre v. Le Fevre, 4 S. & R. 241; Lawrence v. Miller, 86 N. Y. 131, 139.

⁵ Mill Dam Foundry v. Hovey, 21 Pick. 417, 429; Baird v. Blagrove, 1 Wash. Va. 170; Quigley v. De Haas, 2 Out. Pa. 292; Miller v. Watson, 7 Cow. 39.

⁶ Herzog v. Sawyer, 61 Md. 344; Dearborn v. Cross, 7 Cow. 48; Thomson v. Dill, 30 Ala. 444; Robinson v. Bullock, 66 Ala. 548. Contra, as to the discharge before breach. Spence v. Healey, 8 Exch. 668. An unsealed release without consideration is, of course, without effect. Miller v. Hemler, 5 Watts & S. 486; Kidder v. Kidder, 9 Casey, Pa. 268.

⁷ Ante, § 132.

⁸ Phelps v. Seely, 22 Grat. 573;

§ 136. **Engraft Parol on it.** — An agreement not under seal may be engrafted on a prior sealed one; but, by this, the whole is reduced in law to a simple contract.¹ Or, —

§ 137. **Substitute Parol.** — A parol contract may be substituted for a sealed one.² Also, —

§ 138. **Elsewhere.** — In other connections will be found various incidental illustrations of the subject of this sub-title.

§ 139. *The Doctrine of this Chapter restated.*

An instrument under seal has derived, from the ancient law, a dignity superior to that of any other private writing. And, in conclusiveness, it occupies a middle ground between the simple contract and judicial record. Something in modern times — it is difficult to say how much — has been abated of the respect with which it was formerly regarded; and, in a few of our States, it has ceased to be more, or much more, than a simple contract. There is a little uncertainty in the doctrines at some points, or in some States; and practitioners should acquaint themselves specially with the decisions of the courts of their own State relating to this subject.

Green v. Wells, 2 Cal. 584; Townsend v. Empire Stone-Dressing Co. 6 Duer, 208; Dearborn v. Cross, 7 Cow. 48; Dickerson v. Ripley, 6 Ind. 128. And see Brown v. Brine, 1 Ex. D. 5; Johnston v. Salisbury, 61 Ill. 316; Lawrence v. Dole, 11 Vt. 549.

¹ Hydeville Co. v. Eagle Railroad and Slate Co. 44 Vt. 395; French v.

New, 28 N. Y. 147; Acker v. Bender, 33 Ala. 230; Vaughn v. Ferris, 2 Watts & S. 46; Aikin v. Bloodgood, 12 Ala. 221; Whiting v. Heslep, 4 Cal. 327.

² McGrann v. North Lebanon Railroad, 5 Casey, Pa. 82; Low v. Forbes, 18 Ill. 568; Byrd v. Bertrand, 2 Eng. 321; Baird v. Blaisgrove, 1 Wash. Va. 170; Bolt v. Dawkins, 16 S. C. 198.

CHAPTER V.

CONTRACTS OF RECORD.

§ 140. **Defined.** — A contract of record is one made and entered of record before a judicial tribunal.

§ 141. **Judgments.** — Ordinary judgments, wherein defendants are required to pay specified sums to plaintiffs, are by some writers classed as contracts.¹ Under common-law rules, the action of debt,² but not of assumpsit,³ lies on the judgment; except that, upon a foreign judgment, one may at his election maintain assumpsit, for it is not deemed a record.⁴ This view is not conclusive that the domestic — including, with us, the interstate — judgment is not to be regarded as a contract. Still, where it is founded on a pure tort, it is not traceable back to any assent of the mind, as even the contract created by law commonly is; and, where it is the outcome of a contract, such contract is absorbed in the judgment;⁵ so there is no scientific necessity for classifying it under this head, contrary to the common sense of the question. Rejecting, therefore, these judgments from this title, —

§ 142. **Limited Extent.** — With, perhaps, exceptions in some of our States, we have no contracts of record other than recognizances, and it is believed to be substantially the same now in England.⁶

¹ 2 Bl. Com. 464, 465; Leake Con. 125, 155.

² Williams v. Jones, 13 M. & W. 628; Cole v. Driskell, 1 Blackf. 16.

³ 1 Chit. Pl. 103; Andrews v. Montgomery, 19 Johns. 162; Vail v. Mumford, 1 Root, 142; Bain v. Hunt, 3 Hawks, 572; India Rubber Factory v. Hoit, 14 Vt. 92.

⁴ Buttrick v. Allen, 8 Mass. 273; Harris v. Saunders, 4 B. & C. 411.

⁵ Ex parte Fewings, 25 Ch. D. 338, 355.

⁶ Smith Con. 2d Eng. ed. 3. But see, as to the warrant of attorney and *cognovit actionem*, Leake Con. 156, 157.

§ 143. **Statutes Merchant and Staple.** — Formerly, in England, there were familiar bonds of record, known as statutes-merchant and statutes-staple. They were a species of recognizance.¹ In rare instances they may have been resorted to in some of our States in early times,² but they are now unknown with us.

§ 144. **Recognizance.** — The recognizance, with us, is most frequently, but not exclusively, employed in criminal causes; obligating the parties and witnesses, and their bail and other sureties for them, to appear in court, to prosecute, defend, pay adjudged costs, testify, and the like.³

§ 145. **Recognizance defined.** — As defined in the English books, it is “an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act;”⁴ as, to appear at the assizes, to keep the peace, &c.⁵

§ 146. **Discharging.** — A recognizance, being a record, follows the rule of other record debts and judgments as to a discharge out of court; it may be done, and can be only, by an instrument under seal.⁶

§ 147. **Compounding.** — After forfeiture, the sum to be paid may be remitted or reduced in court, by order of the judge, on proper cause shown.⁷ Such is believed to be the common-law rule,⁸ though plainly it could not be applied to the impairing of vested private interests. Still it was held in Massachusetts not competent for the tribunal to relieve the cognizor against a forfeited penalty, as on a hearing in equity upon a bond;⁹ but a statute afterward provided for a remission of the penalty in proper cases.¹⁰ On this and other questions relating to the recognizance, there has been much

¹ 2 Bl. Com. 160; 4 Ib. 426, 428; 2 Tidd Pr. 1132.

² As, see Kilty Rep. Stats. 143.

³ Explained 1 Bishop Crim. Proced. § 264-264 n.

⁴ 2 Tidd Pr. 1131.

⁵ Toml. Law Dict. Recognizance.

⁶ Sewall v. Sparrow, 16 Mass. 24, 26; The State v. Moody, 69 N. C. 529; Barker v. St. Quintin, 12 M. & W. 441.

⁷ In re Pellow, 13 Price, 299; s. c. nom. Ex parte Pellow, McClel. 111; 2 Chit. Gen. Pr. 396, 397; Rex v. Hankins, McClel. & Y. 27.

⁸ 1 Bishop Crim. Proced. § 264 h.

⁹ Johnson v. Randall, 7 Mass. 340; Merrill v. Prince, 7 Mass. 396.

¹⁰ Commonwealth v. Dana, 14 Mass. 65.

legislation with us, and the practitioner should carefully examine the statutes of his own State.

§ 148. **Infancy — Coverture.** — The recognizance, when it is for a necessary thing, like the procuring of one's discharge from arrest, binds, it seems, an infant.¹ But it is not quite so with a married woman; for, under the common-law rules, she cannot render herself personally holden even for necessities. Hence her recognizance will not be valid at the common law, however it may be in equity, or under statutes enlarging her powers.²

§ 149. **Enforcement.** — Like any other record, it proves itself. It may be enforced by "*scire facias*, — a writ which lies on a record only, and consequently cannot be made use of for the purpose of enforcing any other description of contract."³ Likewise the action of debt is maintainable, or in some of our States there is a statutory proceeding.⁴

§ 150. *The Doctrine of this Chapter restated.*

A contract entered into and made of record before a court becomes itself a sort of judgment, in advance, against him who may afterward prove to be in default. It does not admit of the same freedom of inquiry into the merits of the case as do other forms of contract. Hence, in general, the law does not suffer parties to resort to it. The ordinary recognizance, by which some simple thing, like an appearance, is agreed to be done in the presence of the court itself, is not open to this objection, and is, therefore, permitted.

¹ 1 Bishop Crim. Proced. § 264 c; Ex parte Williams, McClel. 493, 13 Price, 673. But see Patchin v. Cromach, 13 Vt. 330.

² 1 Bishop Crim. Proced. § 264 c.

³ Smith Con. 2d Eng. ed. 4.

⁴ 1 Bishop Crim. Proced. § 264 m.

CHAPTER VI.

ORAL CONTRACTS.

§ 151. **Formerly.** — Speech, in the order of time, preceded writing. Even pleadings in court were once, in England, oral; and in our country we have, at the present day, remnants of oral pleas.¹ So likewise there appears to have been in our law a period when contracts of nearly or quite every sort could be made orally, with the same effect as by writing. Thus, for a long time after the Norman Conquest, a deed was not an essential part of a feoffment, but the feoffor could explain his intent orally, while making livery of seisin upon the land.² Since then, —

§ 152. **Changes.** — The convenience of business has introduced contracts which, in their nature, could not be oral, — as, for example, oral words for a bill of exchange cannot be transmitted through the mails, or indorsed on its back, — and the needful perpetuation of some other contracts can be secured only by writing. Moreover, legislative policy has, on one ground and another, rendered writing essential to some contracts. Thus exceptions to the general doctrine have been created. Hence, —

§ 153. **All Contracts, except.** — Every contract, on whatever subject, may be in oral words, which will have the same effect as if written, except where some positive rule of the common or statutory law has provided otherwise.³ Thus, —

¹ 1 Bishop Crim. Proced. § 340, 788–790, 848.

² Deane Conv. 300; 4 Kent Com. 450.

³ Mallory v. Gillett, 21 N. Y. 412; Wyman v. Goodrich, 26 Wis. 21; Bar-

ron v. Benedict, 44 Vt. 518; Besshears v. Rowe, 46 Misso. 501; Coleman v. Eyre, 45 N. Y. 38; Green v. Brookins, 23 Mich. 48; White v. Maynard, 111 Mass. 250; Parsons v. Loucks, 48 N. Y. 17; Selma v. Mullen, 46 Ala. 411;

§ 154. **Insurance.** — A contract of insurance, which in practice is usually by written policy, is equally good if verbally made;¹ except where, as in some of our States, a statute provides to the contrary. And, —

§ 155. **Assignment.** — Though an assignment of a debt is commonly by writing, yet a verbal assignment is good.² So, —

§ 156. **Arbitration.** — A verbal submission of a controversy to arbitration is valid; except that neither it nor the award can extend to what the parties could not themselves do verbally.³ Even —

§ 157. **Acceptance.** — A verbal acceptance of a bill of exchange,⁴ or of a non-negotiable order,⁵ is, if there is no statute to the contrary, good.

§ 158. **Equal in Grade with Written.** — While a verbal contract is not of the same high nature as a specialty,⁶ it is, when valid, on exactly the same footing as a written one unsealed.⁷ It differs merely in the methods of proof. Both are termed —

§ 159. **Simple Contracts.** — All contracts, not under seal, — that is, all parol contracts, whether written or unwritten, — are known as simple contracts.⁸

Bardwell v. Roberts, 66 Barb. 433; *St. Louis, &c. Railway v. Maddox*, 18 Kan. 546; *Ungley v. Ungley*, 4 Ch. D. 73, 5 Ch. D. 887; *Bacon v. Daniels*, 37 Ohio State, 279.

¹ *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448; *Walker v. Metropolitan Ins. Co.* 56 Maine, 371; *First Baptist Church v. Brooklyn Fire Ins. Co.* 19 N. Y. 305; *Hening v. United States Ins. Co.* 2 Dillon, 26; *Strohn v. Hartford Fire Ins. Co.* 33 Wis. 648; *Gerrish v. German Ins. Co.* 55 N. H. 355; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143. And see *Carrugi v. Atlantic, &c. Ins. Co.* 40 Ga. 135.

² *Simpson v. Bibber*, 59 Maine, 196, 199; *Ponton v. Griffin*, 72 N. C. 362; *Currier v. Howard*, 14 Gray, 511, 513; *Spafford v. Page*, 15 Vt. 490; *Garnsey v. Gardner*, 49 Maine, 167; *Porter v.*

Bullard, 26 Maine, 448; *Crane v. Gough*, 4 Md. 316; *Cleveland v. Martin*, 2 Head, 128; *Rollison v. Hope*, 18 Texas, 446.

³ *French v. New*, 28 N. Y. 147; *Thomasson v. Risk*, 11 Bush, 619; *Copeland v. Wading River Reservoir*, 105 Mass. 397; *Peabody v. Rice*, 113 Mass. 31; *Phelps v. Dolan*, 75 Ill. 90; *Stockwell v. Bramble*, 3 Ind. 428.

⁴ *Pierce v. Kittredge*, 115 Mass. 374; *Scudder v. Union National Bank*, 91 U. S. 406; *Barnet v. Smith*, 10 Fost. N. H. 256; *Stockwell v. Bramble*, 3 Ind. 428.

⁵ *Bird v. McElvaine*, 10 Ind. 40.

⁶ Ante, § 128-138.

⁷ Ante, § 25-27; *Chit. Con.* 11th Am. ed. 5.

⁸ *Add. Con.* 7th Eng. ed. 2.

§ 160. **Oral blending with Written.** — Many questions arise as to the effect of the blending of oral contracts and written, in respect both of things which the law requires to be done in writing, and of those which it does not. But they are reserved for other connections.

§ 161. *The Doctrine of this Chapter restated.*

Since oral words preceded written ones, and the time never was when men could live together without entering into contracts, those by mere speech were on every subject originally good. And such is still the general rule. The exceptions are contracts which, in their nature, can be made only in writing, therefore could not have existed until it came into use ; and those which, by a usage grown to be common law, or by some statute, are specially required to be written. *Prima facie*, we look upon an oral contract as good ; but, in the particular sort of case, writing may be found to be necessary.

CHAPTER VII.

SIMPLE CONTRACTS IN WRITING.

§ 162. **Elsewhere.**—Most of what would be appropriate under this head can be better explained, further on, under other titles. We shall here take only a general view of the subject.

§ 163. **Defined.**—A simple contract in writing differs from a specialty¹ chiefly in not being under seal. A written contract is one which, in all its terms, is in writing.

§ 164. **Partly in Writing.**—A contract partly in writing and partly oral is, in legal effect, an oral contract.² It occurs where an incomplete writing, or one expressing only a part of what is meant, is by oral words rounded into the full contract;³ or where there is first a written contract, and afterward it is changed orally.⁴

¹ Ante, § 110.

² Ante, § 133; *Hulbert v. Atherton*, 59 Iowa, 91; *St. Louis, &c. Railway v. Maddox*, 18 Kan. 546; *Smith v. O'Donnell*, 8 Lea, 468; *Vicary v. Moore*, 2 Watts, 451; *Wright v. Weeks*, 25 N. Y. 153; *Brooks v. Wheelock*, 11 Pick. 439; *Dwight v. Pomeroy*, 17 Mass. 303, 328; *Lang v. Henry*, 54 N. H. 57; *Dana v. Hancock*, 30 Vt. 616; *Briggs v. Vermont Central Railroad*, 31 Vt. 211. In *Mullain v. Thomas*, 43 Conn. 252, 254, the learned judge deems it "difficult to see how a contract can be partly oral and partly in writing." Still the books are full of cases in which learned judges supposed they saw it. If I give a man my note payable to himself, and he promises to indorse it and get it discounted, and then pay to my creditor the

money less one per cent for his trouble and risk, — my written and his oral promise being considerations for each other, — is not this a contract partly oral and partly in writing? And a similar case is where, as in *Welz v. Rhodius*, 87 Ind. 1, a man by written lease lets real estate to another to be used in a certain business, and as a part of the bargain promises orally not to carry on himself the same business in the same city. The oral part can be orally proved. *Ib.* And see post, § 175.

³ *Hawkins v. Lee*, 8 Lea, 42; *Callan v. Lukens*, 8 Norris, Pa. 134; *Moss v. Green*, 41 Misso. 389; *Des Moines v. Hinkley*, 62 Iowa, 637.

⁴ *Aldrich v. Price*, 57 Iowa, 151; *Courtenay v. Fuller*, 65 Maine, 156.

§ 165. **Separate Writings**, — on one piece of paper, or on several attached pieces, or on separate papers referring to one another or relating to the same subject, whether made simultaneously or on different occasions and days, may be regarded as one contract, when this view of them is just, and accords with the intent of the parties; and, whether so or not, all should be interpreted together.¹ Yet, —

§ 166. **One Contract or more**. — As foundation for suing, what thus appears to be one contract may in law constitute more contracts than one; this will depend upon the words, the subject, and the other facts and the justice of the case.² Within the same principle, —

§ 167. **Simultaneous — (Oral — Written)**. — Two or more contracts may be simultaneously entered into between the same parties, both in writing or both oral, or one in writing and the other oral.³ Again, —

§ 168. **Writings as Memoranda, &c.** — Parties entering into an oral contract may employ written memoranda in aid of it; in which case, and in others wherein there are writings evidently not meant to be complete, the contract is oral, and as such is not prevented from being good by what is written.⁴

§ 169. **Oral to contradict written**. — These explanations will assist the reader to avoid being misled by the leading rule, that, in the absence of fraud or mistake, oral evidence

¹ *Bobbitt v. Liverpool, &c. Ins. Co.* 66 N. C. 70; *Lyburn v. Warrington*, 1 Stark. 162; *Ridgway v. Wharton*, 6 H. L. Cas. 238, 4 Jur. N. S. 173; *Patch v. Phoenix, &c. Ins. Co.* 44 Vt. 481; *Wildman v. Taylor*, 4 Ben. 42; *Heath v. Williams*, 30 Ind. 495; *Taylor v. Cornelius*, 10 Smith, Pa. 187; *Pillow v. Brown*, 26 Ark. 240, 249; *Bradley v. Marshall*, 54 Ill. 173, 174; *Smith v. Turpin*, 20 Ohio State, 478; *Crop v. Norton*, 2 Atk. 74, 9 Mod. 233; *Dean v. Lawham*, 7 Oregon, 422; *Bradstreet v. Rich*, 74 Maine, 303; *Mackenzie v. Edinburg School Tr.* 72 Ind. 189; 1 Chit. Con. 11th Am. ed. 146, 147. See post, § 382.

² *More v. Bonnet*, 40 Cal. 251; *Davison v. Peticolas*, 34 Texas, 27; *Scott*

v. Kittanning Coal Co. 8 Norris, Pa. 231. See *Whitaker v. Hawley*, 30 Kan. 317.

³ *Phillips v. Preston*, 5 How. U. S. 278; *Garrow v. Carpenter*, 1 Port. 359; *Berryman v. Hewit*, 6 J. J. Mar. 462; *Page v. Sheffield*, 2 Curt. C. C. 377; *Price v. Sturgis*, 44 Cal. 591; *Oregonian Railway v. Wright*, 10 Oregon, 162; *Reynolds v. Hassam*, 56 Vt. 449; *Hedge v. Gibson*, 58 Iowa, 656; *Trayer v. Reeder*, 45 Iowa, 272.

⁴ *Mobile Marine, &c. Co. v. McMillan*, 31 Ala. 711; *The Alida*, 1 Abb. Adm. 173; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Ruggles v. Swanwick*, 6 Minn. 526; *Pinney v. Thompson*, 3 Iowa, 74; *Lathrop v. Bramhall*, 64 N. Y. 365.

of what was said before¹ or at the time of² the making of a written contract is not admissible to vary or especially to contradict its terms, all such matter being deemed to be merged in the writing.³ For example, —

Illustrations. — If the writing calls for payment in money, a contemporaneous oral agreement to pay in something else cannot be shown.⁴ If in form it is a promissory note, proof that it was orally understood between the parties to be a receipt is not permissible.⁵ A mortgage cannot be thus excepted out of the operation of the covenant of warranty in a deed of land.⁶ Nor can it be thus shown that a chattel mortgage in writing was meant to include items not therein inserted; ⁷ or, that an agreement in writing to ship a specified quantity of ice was orally limited to what the shipper owned.⁸ But —

§ 170. Not meant for Contract. — It may be shown by parol that a writing, however complete in form and execution it appears, was not intended by the parties to be their contract; as, where they signed it on the understanding that it should take effect only on a condition which has not been fulfilled.⁹ Yet one cannot thus set up that it was to have simply a par-

¹ *Quartermous v. Kennedy*, 29 Ark. 544; *Woodall v. Greater*, 51 Ind. 539; *Harding v. Commercial Loan Co.* 84 Ill. 251.

² *Martin v. Cole*, 104 U. S. 30; *Belcher v. Mulhall*, 57 Texas, 57, 19; *Bender v. Montgomery*, 8 Lea, 586, 593; *Draper v. Rice*, 56 Iowa, 114; *Davis v. Liberty, &c. Gravel Road*, 84 Ind. 36; *Huffman v. Hummer*, 2 C. E. Green, 263, 269.

³ *Kelly v. Roberts*, 40 N. Y. 432; *Morse v. Low*, 44 Vt. 561; *Giraud v. Richmond*, 2 C. B. 835; *Day v. Thompson*, 65 Ala. 269; *Grimes v. Simpson Centenary College*, 48 Iowa, 208; *Taylor v. Trulock*, 55 Iowa, 448; *Seckler v. Fox*, 51 Mich. 92; *Hei v. Heller*, 53 Wis. 415; *Ives v. Williams*, 50 Mich. 100. See *Meredith v. Salmon*, 21 Grat. 762; *Hilb v. Peyton*, 21 Grat. 386; *Shepard v. Haas*, 14 Kan. 443.

⁴ *Roundtree v. Gilroy*, 57 Texas, 176; *Kimball v. Bryan*, 56 Iowa, 632; *Mc-*

Clure v. People's Freight Railway, 9 Norris, Pa. 269.

⁵ *Dickson v. Harris*, 60 Iowa, 727.

⁶ *Johnson v. Walter*, 60 Iowa, 315; *Bigham v. Bigham*, 57 Texas, 238.

⁷ *Van Evera v. Davis*, 51 Iowa, 637. Compare with post, § 177.

⁸ *Schreiber v. Butler*, 84 Ind. 576.

⁹ *Pym v. Campbell*, 6 Ellis & B. 370, 2 Jur. n. s. 641; *Wallis v. Littell*, 11 C. B. n. s. 369, 8 Jur. n. s. 745; *Davis v. Jones*, 17 C. B. 625; *Juilliard v. Chaffee*, 92 N. Y. 529, 535. See *Greenawalt v. Kohne*, 4 Norris, Pa. 369. Where the parties go so far as to deliver their written contract, a distinction generally admitted is, that the doctrine of the text applies if it is not under seal, but not if it is a specialty; the voluntary delivery, in the latter case, being so high an act as not to admit of a parol denial of its appropriate effect. *Westman v. Krumweide*, 30 Minn. 313; post, § 357.

tial operation as their contract, for this would amount to a contradiction of its terms.¹ Again,—

§ 171. **Illegality—Fraud—Mistake.**—Such illegality, fraud, or mistake as renders a contract void may be shown by parol. And it is no objection to this evidence that it conflicts with the terms of the writing; for, when the law has pronounced it void, it has no terms, and it is not a contract.²

§ 172. **Add to.**—A parol contract may be added to a written one without contradicting the written; and the two may stand together, though entered into simultaneously.³ Thus,—

Illustrations.—If one by writing conveys property to another, this is a complete written contract; yet, as a part of the same transaction, the seller may obligate himself orally to take back the property, should the other not like it, and to pay for improvements thereon. This verbal agreement does not vary the writing or its legal effect, it simply provides for something beyond its scope.⁴ Or, if a bank depositor buys of the bank sight drafts,—such drafts constituting, it is perceived, written contracts,—and if at the same time the bank verbally promises to receive back and credit to him the drafts with interest should he not purchase cattle with them as contemplated, there is here nothing which conflicts with the writing, and the verbal agreement is valid.⁵ Or, if one gives to another a written bill of sale of goods, it may still be shown by parol how the proceeds of the goods were to be applied.⁶ So, likewise, an oral contract and a simultaneous written mortgage to secure its fulfilment may stand together.⁷ Moreover,—

§ 173. **Mortgage by Oral Defeasance.**—A deed or other

¹ *Fenwick v. Brinkworth*, 2 Fost. & F. 86.

² *Ante*, § 121; 2 Kent Com. 556; *Isenhoot v. Chamberlain*, 59 Cal. 630; *Thorne v. Warflemin*, 4 Out. Pa. 519; *Nelson v. Wood*, 62 Ala. 175; *Childs v. Dobbins*, 61 Iowa, 109; *Deakins v. Alley*, 9 Lea, 494.

³ *Ante*, § 167; *Hawkins v. Lee*, 8 Lea, 42; *Trayer v. Reeder*, 45 Iowa, 272;

Montelius v. Atherton, 6 Colo. 224; *Green v. Randall*, 51 Vt. 67.

⁴ *Greenawalt v. Kohne*, 4 Norris, Pa. 369. I have stated here what I understand to be the true reasoning of the law, though it does not quite accord with that in the report. *Ante*, § 12-16.

⁵ *Collingwood v. Merchants Bank*, 15 Neb. 118.

⁶ *Ewaldt v. Farlow*, 62 Iowa, 212.

⁷ *Reynolds v. Hassam*, 56 Vt. 449.

written conveyance of property real or personal, absolute on its face, will, if meant for mere security, take effect as a mortgage. And that it was so meant may be shown by oral evidence.¹ Of course, under our registry laws, one purchasing land so conveyed, not knowing of the defeasance, will hold it absolutely.² This doctrine, now abundantly established in authority, struggled against some early opposition, and against denials of it when its application was attempted in courts of law; and it carries the principle of admitting oral evidence as against a writing to the very verge. Where the thing conveyed is such as can be legally transmitted from party to party without writing, or such as one can orally obligate himself to sell, there is no difficulty in principle with the doctrine. But where it is something which, like lands, the law permits the parties to contract about only in writing, if we look upon the oral part as engrafting a defeasance on the written, it changes it in violation of the rule, or if we look upon it as an added agreement for a reconveyance, it attempts to do orally what the statute says cannot so be done. Still, to the author, this doctrine appears sound, but to rest on another form of reasoning, as follows. We shall see, in other connections, that the statutes which require a writing to make a particular contract good are construed to apply only to actual agreements, not to those which the law creates.³ And where the consid-

¹ *Odell v. Montross*, 68 N. Y. 499; *Matthews v. Sheehan*, 69 N. Y. 585; *McAnnulty v. Seick*, 59 Iowa, 586; *Carter v. Evans*, 17 S. C. 458; *Bettis v. Townsend*, 61 Cal. 333; *Shear v. Robinson*, 18 Fla. 379; *Wallace v. Lewis*, 60 Texas, 247; *Pierce v. Fort*, 60 Texas, 464; *Davis v. Brewster*, 59 Texas, 93; *Loving v. Milliken*, 59 Texas, 423; *Huoncker v. Merkey*, 6 Out. Pa. 462; *Hartley's Appeal*, 7 Out. Pa. 23; *Umbenhower v. Miller*, 5 Out. Pa. 71; *Nicolls v. McDonald*, 5 Out. Pa. 514; *Hurst v. Beaver*, 50 Mich. 612; *Anthony v. Anthony*, 23 Ark. 479; *De Wolf v. Strader*, 26 Ill. 225; *Crane v. Buchanan*, 29 Ind. 570; *Lane v. Shears*, 1 Wend. 433, 437; *Babcock v. Wyman*, 19 How.

U. S. 289; *Vandegrift v. Herbert*, 3 C. E. Green, 466; *Madigan v. Mead*, 31 Minn. 94; *King v. Warrington*, 2 New Mex. 318; *Reed v. Reed*, 75 Maine, 264; *Votaw v. Diehl*, 62 Iowa, 676. The cases to this proposition, a small proportion of which are here cited, are multitudinous. A few of them, principally the older ones, deny this doctrine at law, but admit it in equity; most accept it in both.

² *Frink v. Adams*, 9 Stew. Ch. 485; *Hurst v. Beaver*, 50 Mich. 612; *Newhall v. Pierce*, 5 Pick. 450; *Friedley v. Hamilton*, 17 S. & R. 70; *Mills v. Comstock*, 5 Johns. Ch. 214.

³ Post, § 192-195.

eration of a conveyance, which can always be inquired into by parol,¹ is found to be a loan, so that to keep the property when the loan is paid would be unjust, the law will create the promise, not necessary to be in writing, to reconvey on the payment of the loan, thus making of the transaction a mortgage.

§ 174. **Subsequent Change.** — At any time after a written contract has been entered into, the parties may orally, on a fresh consideration, vary or abrogate it;² or they may substitute for it a new written one.³ And —

Discharge. — A parol discharge will be good even of a contract required by the Statute of Frauds to be in writing.⁴

§ 175. **Imperfect.** — Where, on the face of the writing, it appears to be incomplete or imperfect as a contract, or to embrace only a part of the stipulations meant,⁵ oral evidence may be introduced in connection with it, and from the two the actual contract will be determined.⁶ In such a case, the oral proofs of the intent of the writing should be direct and distinct.⁷ And to certain common writings and parts of contracts this doctrine particularly applies. Thus, —

§ 176. **Receipts.** — In general, receipts of payment, whether embodied in written instruments or not, are deemed to be of the imperfect sort, which, though *prima facie* evidence of what they declare, may be explained or contradicted orally.⁸

¹ Ante, § 75.

² *Flanders v. Fay*, 40 Vt. 316; *Lister v. Clark*, 48 Iowa, 168; *Roberts v. Wilkinson*, 34 Mich. 129; *Church v. Florence Iron Works*, 16 Vroom, 129; *Burkham v. Mastin*, 54 Ala. 122; *Maxfield v. Terry*, 4 Del. Ch. 618; *Juilliard v. Chaffee*, 92 N. Y. 529, 535.

³ Ante, § 68; *Chrisman v. Hodges*, 75 Misso. 413; *Flanagin v. Hambleton*, 54 Md. 222; *McDonough v. Kane*, 75 Ind. 181.

⁴ *Goman v. Salisbury*, 1 Vern. 240.

⁵ Ante, § 168.

⁶ *Lathrop v. Bramhall*, 64 N. Y. 365; *Lash v. Parlin*, 78 Misso. 391; *Campbell v. Short*, 35 La. An. 447; *Phelps v. Whitaker*, 37 Mich. 72; *Richards v. Ful-*

ler, 37 Mich. 161. And see *Birce v. Bletchley*, 6 Madd. 17.

⁷ *Wilson Sewing Machine Co. v. Rutledge*, 60 Iowa, 39.

⁸ *Rollins v. Dyer*, 16 Maine, 475; *Marston v. Wilcox*, 1 Scam. 270; *Walters v. Odom*, 53 Ga. 286; *Smith v. Holland*, 61 N. Y. 635; *Ryan v. Ward*, 48 N. Y. 204; *Hannan v. Oxley*, 23 Wis. 519; *Bryant v. Hunter*, 6 Bush, 75; *Walker v. Christian*, 21 Grat. 291; *Smith v. Schulenberg*, 34 Wis. 41; *Graves v. Key*, 3 B. & Ad. 313; *Winans v. Hassey*, 48 Cal. 634; *Sears v. Wempner*, 27 Minn. 351; *Swain v. Frazier*, 8 Stew. Ch. 326; *Dorman v. Wilson*, 10 Vroom, 474; *Shoemaker v. Stiles*, 6 Out. Pa. 549; *Pool v. Chase*, 46 Texas,

They are so even when expressed to be in full of all demands.¹ For example, the recital in a partnership contract that each partner has contributed to the capital stock a specified sum may be controlled in this way.² And so may even a bank certificate of deposit, but the evidence must be clear and satisfactory.³ Where the writing is both a receipt and a contract, it is only to the receipt part that this doctrine applies.⁴ A warehouse receipt may be of this sort, and then the contract therein cannot be orally contradicted,⁵ but the rest can be.⁶

§ 177. **Bill of Sale.** — Ordinarily a simple bill of sale is of the imperfect class, open to parol explanation.⁷ But an inspection of its terms may show it not to be within this principle; or, if it goes further, and embodies a contract, oral testimony as to it will be excluded.⁸ Again, —

§ 178. **Date.** — The same applies to the date of the writing. *Prima facie* it is the true date, but the real fact may be shown.⁹ Therefore, for example, parties cannot validate a contract they make on Sunday by dating it as of some other

207; *Ellicott v. Barnes*, 31 Kan. 170; *Eylar v. Read*, 60 Texas, 387; *Ditch v. Vollhardt*, 82 Ill. 134; *Reading v. Traver*, 83 Ill. 372; *Pauley v. Weisart*, 59 Ind. 241. See *Grumley v. Webb*, 48 Misso. 562.

¹ *Lee v. Lancashire, &c. Railway*, Law Rep. 6 Ch. Ap. 527; *Guyette v. Bolton*, 46 Vt. 228; *Connell v. Vanderwerken*, 1 Mackay, 242; *American Bridge Co. v. Murphy*, 13 Kan. 35.

² *Lowe v. Thompson*, 86 Ind. 503.

³ *First National Bank v. Myers*, 83 Ill. 507.

⁴ *Goodwin v. Goodwin*, 59 N. H. 548; *Morris v. St. Paul, &c. Railway*, 21 Minn. 91; *Alcorn v. Morgan*, 77 Ind. 184; *Krutz v. Craig*, 53 Ind. 561. See *Williamson v. Reddish*, 45 Iowa, 550.

⁵ *Stewart v. Phoenix Ins. Co.* 9 Lea, 104; *Johnston v. Browne*, 37 Iowa, 200.

⁶ *Hughes v. Stanley*, 45 Iowa, 622.

⁷ *Hazard v. Loring*, 10 Cush. 267, 268; *Irwin v. Thompson*, 27 Kan. 643;

Houghton v. Carpenter, 40 Vt. 588; *Picard v. McCormick*, 11 Mich. 68; *Hildreth v. O'Brien*, 10 Allen, 104; *Linsley v. Lovely*, 26 Vt. 123; *Filkins v. Whyland*, 24 N. Y. 338; *Hersom v. Henderson*, 1 Fost. N. H. 224.

⁸ *Smith v. Gibbs*, 44 N. H. 335; *McCloskey v. McCormick*, 37 Ill. 66.

⁹ Ante, § 114; *Shaughnessey v. Lewis*, 130 Mass. 355; *Smith v. Porter*, 10 Gray, 66; *Perrin v. Broadwell*, 3 Dana, 596; *Plunkett v. Dillon*, 4 Del. Ch. 198; *Eaton v. Trowbridge*, 38 Mich. 454; *Buchanan v. Tracy*, 45 Misso. 437; *Winn's Succession*, 33 La. An. 1392; *Knisely v. Sampson*, 100 Ill. 573; *Potez v. Glossop*, 2 Exch. 191; *Anderson v. Weston*, 6 Bing. N. C. 296; *Laws v. Rand*, 3 C. B. n. s. 442. See *Seldonridge v. Connable*, 32 Ind. 375; *Richards v. Betzer*, 53 Ill. 466. There is no presumption, from the date, as to when a forged deed was delivered. *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

day.¹ The date of an instrument with no date written in may be orally established.²

§ 179. **Void or Unintelligible.** — Where, from any cause, a written contract is void, — as, for example, where it is unintelligible, — the party is permitted, if he can, to show the oral understanding; and, if it constitutes a complete and unobjectionable contract, it will prevail. A void writing is not a thing capable of oral contradiction, there is nothing to contradict.³

§ 180. *The Doctrine of this Chapter restated.*

All the contracts which may be made orally are equally good in writing. But, unless they are sealed, they rank in law only as parol contracts; in other words, as simple contracts. There are classes of contracts which, by special provisions of law, must be in writing. To them the parties may affix their seals if they choose; and, though they are thus made specialties, they are still written, within the laws which require writing.⁴ A writing may constitute a part of an oral contract; as, where it is a mere accompanying memorandum, or where what was once a written contract has been varied orally, or the like. Whether a transaction or form of words has created one contract or more than one will depend upon the intent of the parties, the subject, their words, and the construction of law thereon. A written contract honestly made, and meant by the parties to embrace their entire bargain, may be confirmed by oral testimony,⁵ but it cannot thus be contradicted.

¹ Post, § 543; *Heller v. Crawford*, 37 Ind. 279.

² *Davis v. Jones*, 17 C. B. 625.

³ *Moulding v. Prussing*, 70 Ill. 151.

⁴ *McKensie v. Farrell*, 4 Bosw. 192.

⁵ *Southern Mut. Ins. Co. v. Trear*, 29 Grat. 255.

CHAPTER VIII.

CONTRACTS CREATED BY LAW.

§ 181. Introduction.

182-203. General Doctrine.

204-237. Illustrative Instances.

238. Doctrine of Chapter restated.

§ 181. **How Chapter divided.** — We shall consider, I. The General Doctrine; II. Illustrative Instances.

I. *The General Doctrine.*

§ 182. **Fictions of Law.** — One of the most interesting features of our law is its fictions. Not quite all of them are useful and wise, but most are, and some of them are so essential that they could be dispensed with only at great inconvenience. Of the latter sort is the fiction to be explained in this chapter.

§ 183. **Torts and Contracts.** — The great mass of our law, not all, is divided into two parts; namely, contracts, and those rights the violations whereof are termed torts. And the procedure of the courts for its enforcement takes shape accordingly. To accommodate the procedure, and render the law itself more lucid, the fiction that the law creates in certain circumstances a contract¹ has been recognized, rather than invented, by the tribunals. It is that —

¹ **Terms and Classification.** — Contracts created by law are often, perhaps oftener than otherwise, confounded with the implied contracts to be treated of in the next two chapters, all being called implied. Blackstone, for example, di-

vides contracts into express and implied. "Express contracts," he says, "are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated

§ 184. **Defined.**—When the law lays on one a duty to another, it creates a promise from the former to the latter to discharge the duty.¹ The limits of the doctrine are, that, —

§ 185. **Limits of Doctrine.**—Where, from the nature of the case, not merely from inability of the party,² there could not be a contract in fact, the law does not undertake to create the impossible. Thus, since a tort would not be a tort if the party injured consented,³ since also the tort-feasor did not consent in fact as to a contract, and since an actual contract requires mutual consent, the law does not transmute into a contract the tort which neither was nor could be such in fact. Again, since two inconsistent contracts cannot exist together, and since there is no need for two which coincide, if the

price for certain goods. Implied are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me or perform any work, the law implies that I undertook, or contracted, to pay him as much as his labor deserves." 2 Bl. Com. 443. The contracts which Blackstone thus indicates in illustration of the implied may quite properly be called by the name. But where the law compels a man to respond as to a contract against his dissent uttered simultaneously with the making, — as, for example, where it holds him to pay a tradesman for necessities furnished his discarded wife at the very instant he is notifying the tradesman that he will not pay, 1 Bishop Mar. & Div. § 555; Central Bridge v. Abbott, 4 Cush. 473, 475, — the term "implied" seems less accurately to designate this legal conclusion than "created." Still, in the many sorts of transaction which are subject to this one legal result, there are great diversities; and it is not always plain whether a particular instance should be classed with the implied or the created contracts. I by no means assume that the classifications of these chapters are perfect; they are such as seemed

convenient. To the learner, this mere matter of classification is not of prime importance; for, except as to a few questions, it does not affect the law itself.

¹ **Concerning Definitions.**— This definition, like all others in the law, proceeds, not from any single adjudication, since no one judgment of a court ever did or could create or establish a definition, but from all the decisions on the subject, and all the legal reasons relating thereto, combined. For a definition in the law is the epitomized law which it defines. A text-writer may adopt as his own a form of definition given by some judge or preceding author, or he may condense anew the law into a definition, as the exigencies of the particular instance indicate; but, whether the one or the other, the definition is simply his own judgment of the effect which the condensation produces. In the strict sense, therefore, a definition in the law has no weight in authority; it is not the law, but the author's judgment of what the law in epitome is. And see post, § 217, note.

² Post, § 200.

³ Peacock v. Terry, 9 Ga. 137; Reynolds v. Fenton, 2 Philad. 298.

parties have covered a particular transaction by their actual contract, the law will not create one.¹ To be more specific, —

§ 186. **As to Torts.** — There is no authority for deeming that the law will, under any circumstances, treat that as a contract which in fact was a tort; and both reason and the adjudications² exclude such an assumption. An apparent exception confirms this rule; namely, that, in certain cases, principally where the tort-feasor has converted into money the things which he took by wrong, the person injured may waive the tort and sue as on a contract created by law.³

§ 187. **As to where there is Contract in Fact.** — Obviously, to follow up what was just stated,⁴ if a transaction proceeded on the express terms of an agreement, and they were not departed from, those terms will furnish the limits of the rights and responsibilities of the parties; and the law, having no occasion to, will not create others.⁵ There is authority for qualifying this proposition by another; namely, that, if the express contract is not under seal, and embraces only what the law would imply, a party may sue on it or the implied contract at his election.⁶ But where, as in this case, the express contract supplies all needs, completely covering the transaction, does the law commit the folly of creating the needless? Is there any implied contract? In reason, no.⁷

¹ *Van Fleet v. Van Fleet*, 50 Mich. 1; *Commercial Bank v. Pfeiffer*, 22 Hun, 327; *Pontifex v. Midland Railway*, 3 Q. B. D. 23, 27. "Promises in law only exist where there is no express stipulation between the parties." *Buller, J. in Toussaint v. Martinnant*, 2 T. R. 100, 105.

² *McCoun v. New York Central, &c. Railroad*, 50 N. Y. 176; *Jones v. Hoar*, 5 Pick. 285; *Schweizer v. Weiber*, 6 Rich. 159; *Carson River, &c. Co. v. Bassett*, 2 Nev. 249; *Balch v. Patten*, 45 Maine, 41; *Fuller v. Duren*, 36 Ala. 73.

³ *Gilmore v. Wilbur*, 12 Pick. 120, 124; *Jones v. Baird*, 7 Jones, N. C. 152; *Strother v. Butler*, 17 Ala. 733; *Bethlehem v. Perseverance Fire Co.* 31 Smith, Pa. 445, 460; *Rodgers v. Maw*, 15 M. &

W. 444, 448; *Oughton v. Seppings*, 1 B. & Ad. 241; *Hambly v. Trott*, Cowp. 372; *Smith v. Baker*, Law Rep. 8 C. P. 350.

⁴ Ante, § 185.

⁵ *Toussaint v. Martinnant*, 2 T. R. 100; *North v. Nichols*, 37 Conn. 375; *Whiting v. Sullivan*, 7 Mass. 107; *Draper v. Randolph*, 4 Harring. Del. 454; *Voorhees v. Combs*, 4 Vroom, 494; *Holden Steam Mill v. Westervelt*, 67 Maine, 446.

⁶ *Gibbs v. Bryant*, 1 Pick. 118; *Princeton, &c. Turnpike v. Gulick*, 1 Harrison, 161.

⁷ And see *Walker v. Brown*, 28 Ill. 378; *Dermott v. Jones*, 2 Wal. 1; *Hyde v. Liverse*, 1 Cranch C. C. 408; *Maupin v. Pic*, 2 Cranch C. C. 38; *Brockett v. Hammond*, 2 Cranch C. C. 56; *Brown*

§ 188. **Express Contract Voidable or Void.** — Obviously a void contract is the same as none,¹ and a voidable one may be so treated. Therefore in either case there is room for the law to create what the parties have not supplied. So that, for example, if an express agreement fails by reason of the consideration being illegal, one who in reliance upon it has benefited the other by some lawful thing may recover pay therefor, on a contract which the law will create.² Or if necessities are furnished a minor or insane person on terms agreed, yet not binding by reason of the minority or insanity, the party may recover of the one in law liable to pay, not what the apparent contract provides, though it may be looked to, but what they were reasonably worth.³

§ 189. **Nature of the Created Contract.** — For most purposes

v. Perry, 14 Ind. 32; *Eggleston v. Buck*, 24 Ill. 262; *Western v. Sharp*, 14 B. Monr. 177; *Chandler v. The State*, 5 Har. & J. 284. Further of this. — In Met. Con. 7, 8, the exception stated in the text as doubtful is accepted, and others are added; namely, "If the terms of an express agreement have been performed, so as to leave a mere simple debt or duty between the parties, the plaintiff may recover on the implied contract." This proposition is familiar in the common law of pleading, and by it the plaintiff is enabled greatly to shorten his declaration. But the implied contract grows out of a new state of facts, and it is not coincident with the express one. Its creation by the law was not absolutely indispensable to justice, yet it was highly convenient, and practically useful. Another "exception" stated by the author is that, "when both parties have departed from the special agreement, the law will raise an implied one." This instance is further than the other from the creation of a contract coinciding with the express one. Here the thing created grows distinctly out of new facts, without which the creation would not be. Again, "when a party has failed to perform his express contract according to its terms, but has performed it defectively, and

cannot maintain an action thereon, yet if he has acted in good faith he may recover of the other party, on an implied contract, the amount of the benefit, if any, which that party has received," though it is otherwise if what he did was in bad faith. Here also there was no express contract; for, though there had been one, it was set aside. Therefore this case furnishes no exception to the rule, that the law will not create a contract out of a transaction which has an express one to govern it. This author goes on to observe, that, though the law will not, in the absence of any legal duty resting on a party, imply a contract contrary to his declaration, "this can be true only where there is no legal duty paramount to" his will. If "such duty exists, a promise will be implied even against the party's strongest protestations." And see ante, § 183, note. There can be no doubt of either branch of this proposition. It was affirmed in full in *Earle v. Coburn*, 130 Mass. 596, 598. "The law," where it has imposed the duty on the objecting party, "promises," said Lord, J. "in his stead."

¹ *Gist v. Smith*, 78 Ky. 367.

² *Thurston v. Percival*, 1 Pick. 415.

³ *Parsons v. Keys*, 43 Texas, 557; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Hyer v. Hyatt*, 3 Cranch C. C. 276.

a contract which the law has created is not distinguishable, except in the mode of proof, from one formerly entered into between the parties.¹ Thus, —

§ 190. **In Pleading.** — Under the common-law rules, contracts created by law and all implied contracts are alleged in a declaration in the same manner as express ones.² For example, the form of action may be *assumpsit*; ³ and then, as in other cases of *assumpsit*, a consideration must be alleged.⁴ There are statutory rules under which this is otherwise. Still, —

§ 191. **Meaning of "Contract."** — Almost universally, both in legal and popular language, the word "contract" is employed to denote an undertaking voluntarily entered into between the parties; not drawing into contemplation any creation of the law. We have seen that so are the definitions in all our books of the law preceding in date the present work.⁵ Such also are the definings both in our law dictionaries and in the general dictionaries of the language. Hence, properly, —

§ 192. **In Statute.** — The word in a statute is ordinarily interpreted in the same way, as referring only to contracts actually or presumably made in fact, and not including these creations of the law.⁶ It has even been held not to comprehend a recognizance,⁷ though we have seen⁸ that a recognizance is, in the law of contracts, to be reckoned as a contract. To illustrate, —

§ 193. **Statute of Frauds.** — The Statute of Frauds, requiring contracts on some particular subjects to be in writing,

¹ "The difference between express and implied contracts is merely a difference in the mode of proof." Lord Denman, C. J. in *Church v. Imperial Gas-light and Coke Co.* 6 A. & E. 846, 860.

² 1 Chit. Pl. 302; *Wingo v. Brown*, 12 Rich. 279; *Bailey v. Bussing*, 29 Conn. 1.

³ *Johnson v. Reed*, 3 Eng. 202; *Ridgeway v. Toram*, 2 Md. Ch. 303; *Wyman v. American Powder Co.* 8 Cush. 168, 180; *Pawlet v. Sandgate*, 19 Vt. 621; *Stimpson v. Sprague*, 6 Greenl.

470; *Downing v. Freeman*, 13 Maine, 90; *Wood v. O'Kelley*, 8 Cush. 406; *Monson v. Williams*, 6 Gray, 416.

⁴ *Wingo v. Brown*, 12 Rich. 279.

⁵ Ante, § 22, note.

⁶ For example, *McCoun v. New York Central, &c. Railroad*, 50 N. Y. 176, 180-182. **Mechanic's Lien.** — It is held that a mechanic's lien may be enforced on an implied contract. *Foerder v. Wesner*, 56 Iowa, 157; *Neilson v. Iowa Eastern Railroad*, 51 Iowa, 184.

⁷ *Gay v. The State*, 7 Kan. 394.

⁸ Ante, § 144-146.

is construed as not extending to those which are created by law, or by special statutes, not depending on the will of the parties.¹ Within this rule are —

§ 194. **Resulting Trusts.** — A provision of this statute makes writing necessary in agreements affecting interests in lands. But, as it is not applied by the courts to the creations of the law, if land is bought and paid for with the money of one man and the deed is made to another, and there is no evidence or presumption that a gift was intended, the law will imply a promise by the grantee to hold it in trust for the person whose money procured the conveyance. This is called a resulting trust.² In some of the States, the statute expressly excepts resulting trusts; but, whether the exception is in the statute or not, the consequence is the same; namely, that the trust thus created by law is good, though there is no writing declaring it, and it may be even established by verbal evidence.³ By a like construction, —

§ 195. **Mortgage.** — It was shown in the last chapter⁴ that, notwithstanding the Statute of Frauds, and notwithstanding the rule of evidence which forbids a writing to be varied by oral proofs, if the consideration of a deed of land was a loan, which the law requires the grantee to repay, it, to follow the better reasoning, will create a promise from him to the grantor to repay it, thus converting the conveyance absolute on its face into a mortgage. The word “contract” or “agreement” in the statute being construed to refer only to what actually transpired between the parties, not in any degree to the law’s

¹ *Thompson v. Blanchard*, 3 Comst. 335; *Doolittle v. Dininny*, 31 N. Y. 350; *Smith v. Bradley*, 1 Root, 150; *Goodwin v. Gilbert*, 9 Mass. 510. See post, § 309.

² 2 *Bishop Mar. Women*, § 118 et seq.; *Follansbe v. Kilbreth*, 17 Ill. 522; *Chastain v. Smith*, 30 Ga. 96; *Brown v. Dwelley*, 45 Maine, 52; *Smith v. Boquet*, 27 Texas, 507; *Gee v. Gee*, 32 Missis. 190; *Hatton v. Landman*, 28 Ala. 127; *Partridge v. Havens*, 10 Paige, 618; *Douglass v. Brice*, 4 Rich. Eq. 322; *Shepherd v. White*, 10 Texas, 72; *Goldsberry v. Gentry*, 92 Ind. 193.

³ 4 *Kent Com.* 305, 306; *Caple v. McCollum*, 27 Ala. 461; *Cook v. Kennerly*, 12 Ala. 42; *McGuire v. Ramsey*, 4 Eng. 518; *Dean v. Dear*, 6 Conn. 285; *Peabody v. Tarbell*, 2 Cush. 226; *Hanft v. Howard*, 3 Jones Eq. 440; *James v. Fulcrod*, 5 Texas, 512; *Leakey v. Gunter*, 25 Texas, 400; *Cloud v. Ivie*, 28 Misso. 578; *Farrington v. Barr*, 36 N. H. 86; *Benson v. Matsdorf*, 11 Johns. 91; *Malin v. Malin*, 1 Wend. 625; *Slaymaker v. St. John*, 5 Watts, 27; post, § 1216.

⁴ Ante, § 173.

creation, there is nothing therein to intercept this consequence of the law. Again, —

§ 196. **In Express Contract.** — A written contract is interpreted similarly to a statute.¹ Therefore express terms in it are not applied to restrain the law in making its creations. Thus, —

§ 197. **Bankruptcy as to Assignment of Policy.** — An assignment in bankruptcy is a contract created by the law of bankruptcy. Hence an insurance policy, with a clause making it void if assigned without the consent of the insurer, does not become so on an assignment in bankruptcy, executed by the proper officer.² Moreover, —

§ 198. **Condition in Covenant.** — A lease with the condition that the lessee shall not “let, set, assign, transfer, make over, barter, exchange, or otherwise part with this indenture,” does not prevent the leased premises being taken in execution, even though the judgment was confessed on a warrant of attorney from the lessee. By express words, it would be in the power of the parties to avoid this result.³ These illustrations are sufficient for the conclusion which they indicate; namely, —

§ 199. **Not Written or Unwritten.** — A contract created by law — not merely presumed, but created⁴ — constitutes a class by itself; being deemed neither written nor unwritten. Not only, as we have just seen, may it be superinduced by the courts on a transaction as to which the parties could not contract except by writing,⁵ but it may be so also where they

¹ Bishop Written Laws, § 4, 77, 98 a.

² Starkweather v. Cleveland Ins. Co.

³ 2 Abb. U. S. 67.

⁴ Mitchinson v. Carter, 8 T. R. 57.

⁵ Ante, § 183, note.

⁶ **An Inaccurate Dictum.** — In Chase v. Second Avenue Railroad, 97 N. Y. 384, it was held that the lessee, in writing, of the exclusive privilege to put advertisements in the defendant's cars for two years, did not, by exercising the privilege without objection from the defendant for a short time after the two years expired, acquire a right by implication of law to treat the

lease as renewed, either for two years, or for one. The case seems plain, and the decision is unquestionably correct. But the learned judge, in delivering the opinion, said some things not quite consistent with what is abundantly established. Thus, “The law did not imply a renewal of the contract for a term of two years, because such a contract, which was not to be performed and could not be performed within one year, not being in writing, was void under the Statute of Frauds. The law will not imply an unwritten contract which the parties themselves could not make without writ-

are persons incapable of binding themselves by contract in any form. For example, —

§ 200. **Mental and Legal Capacity.** — While an express contract requires mental and legal capacity in the party, the law can create one without. Illustrations of this appear in other connections ;¹ as, in the cases of infants and insane persons, whom the law often binds by contracts which it creates, where they could not bind themselves. Thus, —

§ 201. **Infant for Wife's Ante-nuptial Debts.** — An infant cannot contract to pay the debts of another.² Yet, if he marries, the common law (it is otherwise under various recent statutes) creates for him the contract to pay the ante-nuptial debts of his wife.³ Again, —

§ 202. **Infant accepting Deed-poll.** — As an infant has the capacity to accept an estate, he is bound by any conditions in the deed conveying it to him.⁴ Plainly, therefore, if the deed has recitals of things to be done by the grantee, the law, which would found a promise upon them were he of age, will do it equally in the case of an infant. But, further, —

§ 203. **Law's Promise not a Specialty — Deed-poll.** — From the doctrine of the deed-poll, we derive the further proposition that the law's promise is not a specialty ; just as, we have seen,⁵ it is neither a written nor an oral contract. If one accepts a deed-poll conveying lands, and it recites that he shall do such and such things, the law creates a promise from him to do them ; but the promise is not, like the deed-poll, under

ing. It will sometimes imply an obligation on the part of a person who has received a benefit under a contract condemned by the Statute of Frauds, to make compensation to the other party. An implied contract is one which the law infers from the facts and circumstances of the case ; but it will not be inferred, so far as I can conceive, in any case where an express contract would for any reason be invalid. The law will not make that valid without a writing which the law requires should be in writing." p. 388, 389. If the learned judge here refers to a presumed actual contract, —

that is, where the words were really interchanged by speech or by writing, — there can be no objection to these observations. But if otherwise, the authorities which sustain the text of the several connected sections above are conclusive that he spoke unadvisedly.

¹ Ante, § 188 ; post, § 227, 232, 234, 235.

² *Maples v. Wightman*, 4 Conn. 376 ; *Nightingale v. Withington*, 15 Mass. 272, 274.

³ *Butler v. Breck*, 7 Met. 164.

⁴ *Parker v. Lincoln*, 12 Mass. 16, 18.

⁵ Ante, § 199.

seal. It is not a covenant, but a simple-contract promise, on which the action of assumpsit, but not of covenant, may be maintained.¹ Nor yet is the promise deemed to be in writing, for it is not within the Statute of Frauds; it is, let us repeat, simply a promise in law.²

II. *Illustrative Instances.*

§ 204. **Already**, — in the foregoing sub-title, we have had, in connection with the doctrine, many illustrations of it. So this sub-title will be little else than a continuation of the other.

Law's Command. — The law, by placing its command in whatever form upon one to do a thing for the benefit of another or the State, creates the promise from the former to the latter to do it; as, for example, in the words of Blackstone, "whatever the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge."³ Thus, —

§ 205. **Statutory Duty.** — When a statute imposes on one a duty, the law creates a promise from him to the party to be benefited thereby to perform it.⁴ To illustrate, —

§ 206. **Tolls.** — A person who passes a toll-gate evading the statutory toll may be proceeded against under a promise of payment which the law will make for him. And it is so even where the statute has provided a penalty.⁵ Further to illustrate, —

¹ *Harriman v. Park*, 55 N. H. 471; *Mellen v. Whipple*, 1 Gray, 317; *Brewer v. Dyer*, 7 Cush. 337, 340; *Guild v. Leonard*, 18 Pick. 511; *Nugent v. Riley*, 1 Met. 117; *Newell v. Hill*, 2 Met. 180; *Rex v. Arnesby*, 3 B. & Ald. 584, 587; *Burnett v. Lynch*, 5 B. & C. 589, 602; *Martin v. Drinan*, 128 Mass. 515; *Wilenborg v. Illinois Central Railroad*, 11 Bradw. 298; 1 Chit. Pl. 104. But see *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35.

² *Goodwin v. Gilbert*, 9 Mass. 510, 514; *Harriman v. Park*, *supra*, *Smith, J.*, at p. 472.

³ 3 Bl. Com. 160; *Gray v. Bennett*, 3

Met. 522, 526; *Bowen v. Hoxie*, 137 Mass. 527, 531.

⁴ *Hillsborough v. Londonderry*, 43 N. H. 451; *Anonymous*, 6 Mod. 27; *Waller v. Bank of Ky.* 3 J. J. Mar. 201; *Bridgen v. Cheever*, 10 Mass. 450; *Pawlet v. Sandgate*, 19 Vt. 621; *Tilson v. Warwick Gas Light Co.* 4 B. & C. 962, 967; *Goody v. Penny*, 9 M. & W. 687, 691; *Swansea v. Hopkins*, 8 M. & W. 901; *Shepherd v. Hills*, 11 Exch. 55, 63, 67.

⁵ *New Albany, &c. Plank Road v. Lewis*, 49 Ind. 161; *Central Bridge v. Abbott*, 4 Cush. 473.

§ 207. **Compensation for Statutory Duty.** — To some extent, yet limited by provisions in our constitutions, the legislature of a State may require of the people personal services for purposes designated. There are, connected with this proposition, questions not within the scope of the present work, and the courts in discussing those within it have not always employed reasons¹ quite considerately. But the reasoning which the present elucidations suggest, leading to the results arrived at by the tribunals, is, that when the legislature having authority imposes on one a duty, it creates the promise from him to discharge it; so that, being under the obligation, he can claim no pay for doing the duty, and any pay given him is a mere gratuity.² By reason of which, a statute may at the legislative pleasure vary or take away, as to future services, an established compensation. Thus, —

§ 208. **Official Persons.** — Every citizen is under obligation, when duly required, to accept a public office and discharge its duties.³ Therefore, following the above reasoning, a public officer is, in the absence of any constitutional regulation of the question, entitled to no fees or other pay, except what is provided by the statutes; and the legislature may at will diminish so much of a compensation which it has established as has not yet been earned, or take it away, or impose additional duties without added pay, or abolish the office.⁴ A legislative act creating an office, or fixing a salary, is not a “contract” within the provision of the Constitution of the United States⁵ forbidding the States to pass laws “impairing the obligation of contracts.”⁶ And except under a constitutional guaranty,

¹ Ante, § 12, 14–16.

² *Anderson v. Jefferson*, 25 Ohio State, 13; *The State v. Baldwin*, 14 S. C. 135; *Cincinnati, &c. Railroad v. Lee*, 37 Ohio State, 479.

³ 1 Bishop Crim. Law, § 246, 458–464.

⁴ *Hall v. The State*, 39 Wis. 79; *Carlyle v. Sharp*, 51 Ill. 71; *People v. Devlin*, 33 N. Y. 269; *Andrews v. United States*, 2 Story, 202; *Turpen v. Tip-ton*, 7 Ind. 172; *Miami v. Blake*, 21

Ind. 32; *Haynes v. The State*, 3 Humph. 480; *Farwell v. Rockland*, 62 Maine, 296; *Crittenden v. Crump*, 25 Ark. 235; *Kitchell v. Madison*, 4 Scam. 163; *People v. Campbell*, 3 Gilman, 466; *Barker v. Pittsburgh*, 4 Barr, 49; *Joliet v. Tuohey*, 1 Bradw. 483; ante, § 47.

⁵ Const. U. S. art. 1, § 10.

⁶ *The State v. Smedes*, 26 Missis. 47; *Swann v. Buck*, 40 Missis. 268; *Hoboken v. Gear*, 3 Dutcher, 265. And see *Marden v. Portsmouth*, 59 N. H. 18.

there can be no contract, express or implied, for the permanence of the salary of a public officer.¹ Again, —

§ 209. **Paupers.** — If a statute has imposed on a town or county the duty of rendering support to paupers, the foregoing reasoning shows that, after it has furnished the support in a particular instance, thus discharging its own obligation, it can recover therefor nothing of any other body or person. The common illustration is where the pauper is found afterward in possession of property, or his estate is so, upon his death; and it is held that, in the absence of fraud, there is no implied promise whereon to base an action for pay. Another form of reasoning, leading to the same result, is to regard the relief as an executed gift;² which, therefore, cannot be reclaimed.³ Now, —

§ 210. **Gift.** — In all cases of a gift, whether of money, goods, services, or anything else, made perfect by the delivery of the thing given,⁴ there is nothing out of which the law can create a promise. And it is believed that a contract will never be implied where the consideration was originally intended for a gift.⁵ Thus, —

§ 211. **Pay another's Debt.** — One's voluntary payment of another's debt is like any other gift. If accepted by the creditor in discharge of the debt, it has that effect in law,⁶ but the person paying has no claim upon the debtor. For, in our law, whatever may be the rule in other systems of jurisprudence, no one can make himself the creditor of another

¹ Bishop Written Laws, § 178 a; Koontz v. Franklin, 26 Smith, Pa. 154.

² Ante, § 82.

³ Stow v. Sawyer, 3 Allen, 515, 517; Bremer v. Curtis, 54 Iowa, 72; Deerisle v. Eaton, 12 Mass. 328.

⁴ Ante, § 82; Sanborn v. Goodhue, 8 Post. N. H. 48; Biddle v. Carraway, 6 Jones Eq. 95.

⁵ Whaley v. Peak, 49 Misso. 80; Schnell v. Schroder, Bailey Eq. 334; Safety Deposit Life Ins. Co. v. Smith, 65 Ill. 309; Rockford, &c. Railroad v. Sage, 65 Ill. 328; Watson v. Ledoux, 8 La. An. 68; Davenport v. Mason, 15

Mass. 85, 90; Osier v. Hobbs, 33 Ark. 215; French v. Smith, 58 N. H. 323; Keiser v. The State, 82 Ind. 379.

⁶ Martin v. Quinn, 37 Cal. 55; Harrison v. Hicks, 1 Port. 423. In matter of mere pleading, it is said that accord and satisfaction, where the satisfaction is laid as from a stranger, is not good. Edgcombe v. Rodd, 5 East, 294; Clow v. Borst, 6 Johns. 37; Grymes v. Blofield, Cro. Eliz. 541; Daniels v. Hallenbeck, 19 Wend. 408; Stark v. Thompson, 3 T. B. Monr. 296, 302. As to which, and supporting the text, see 2 Chit. Con. 11th Am. ed. 1133.

who does not in fact or by legal implication consent.¹ To this there is a single exception, limited to the law-merchant; namely, —

§ 212. **Paying supra Protest.** — A person who accepts and then pays, or pays without accepting, *supra protest*, a dishonored bill of exchange, has his remedy over against the drawer or other party for whose honor he interposed, though he was not requested, and was not the agent of such party.² Still, —

§ 213. **Under Obligation.** — Consistently with the foregoing doctrine, if one who is under any obligation, of a sort recognized in a court either of law or of equity, makes, pursuant thereto, a payment on the account of another, the law creates a promise from the latter to reimburse him.³ But a mere moral obligation will not satisfy this rule.⁴ The common illustration is —

§ 214. **Suretyship.** — A person who has become surety for another is, if he discharges the debt of his principal, entitled to recover of him what he paid, on a contract which the law will imply, though nothing on the subject was said when the suretyship was entered into.⁵ Again, —

§ 215. **Save own Property.** — Where one's own property can be preserved only by paying the debt of another, the law will create, on its payment, the promise from the debtor to reimburse the payer.⁶ Thus, if, after goods are bought, there

¹ Johnson v. Royal Mail Steam-packet, Law Rep. 3 C. P. 38, 41; Exall v. Partridge, 8 T. R. 308, 310; Sleigh v. Sleigh, 5 Exch. 514; South Scituate v. Hanover, 9 Gray, 420; Junkins v. Union School District, 39 Maine, 220; Bancroft v. Abbott, 3 Allen, 524; Little v. Gibbs, 1 Southard, 211; Jones v. Wilson, 3 Johns. 434; Menderback v. Hopkins, 8 Johns. 436; Munroe v. Easton, 2 Johns. Cas. 75; Beach v. Vandemburgh, 10 Johns. 361; Richardson v. Williams, 49 Maine, 558; Woodford v. Leavenworth, 14 Ind. 311; Oden v. Elliott, 10 B. Monr. 313; Winsor v. Savage, 9 Met. 346; Lewis v. Lewis, 3 Strob. 530; Blanchard v. First Association of Spiritualists, 59 Maine, 202.

² 3 Kent Com. 87; Bayley Bills, 5th Eng. ed. 178, 325, 326; Byles Bills, 150-154; Leake v. Burgess, 13 La. An. 156.

³ Hutton v. Eyre, 6 Taunt. 289, 296.

⁴ Atkins v. Banwell, 2 East, 505. Compare with ante, § 44.

⁵ Copis v. Middleton, Turn. & R. 224; Gibbs v. Bryant, 1 Pick. 118, 121; Powell v. Smith, 8 Johns. 249; Hassinger v. Solms, 5 S. & R. 4, 8; Ward v. Henry, 5 Conn. 595; Appleton v. Bascom, 3 Met. 169; Kimble v. Cummins, 3 Met. Ky. 327; Exall v. Partridge, 8 T. R. 308, 310; Clay v. Severance, 55 Vt. 300.

⁶ Exall v. Partridge, 8 T. R. 308; Cole v. Malcolm, 66 N. Y. 363.

is discovered on them a lien which was placed by the seller, the latter will be under the law's promise to repay, to the buyer, what he pays to lift the lien.¹ So, also, if an innocent purchaser of goods which were imported in violation of the revenue laws, is compelled to pay money to prevent their forfeiture, he may recover it of the seller.²

§ 216. **Contribution.** — When persons are under equal obligation to do a thing not violative of law, and one of them does it, if there is no circumstance rendering the equities between them otherwise than equal, and no express agreement, the doer is entitled, under a promise which the law creates, to recover such sums of his several companions as shall leave the burdens equal.³ This is the familiar rule as between sureties⁴ and other joint promisors,⁵ where one has discharged more than his proportion of a debt; and it applies also in other like cases.⁶ If there is an express agreement, it prevails, even though made by parol;⁷ so likewise other equities in the particular case may vary the result.⁸ But, since even an express promise founded on a consideration immoral, illegal, or contrary to public policy is void,⁹ the law will not create a contract between its violators;¹⁰ so that, for example, if execution on a judgment against several persons for a tort is satisfied out of the effects of one, he cannot compel contribution from his co-defendants.¹¹ This exception does not pre-

¹ *Alford v. Cobb*, 28 Hun, 22.

² *Summers v. Clark*, 29 La. An. 93.

³ *Dimes v. Arden*, 6 Nev. & M. 494; *Fowler v. Donovan*, 79 Ill. 310; *Kincaid v. Hocker*, 7 J. J. Mar. 333.

⁴ 1 Story Eq. § 493, 499 *d*; *Robertson v. Deatherage*, 82 Ill. 511; *Wells v. Miller*, 66 N. Y. 255.

⁵ *Owens v. Collinson*, 3 Gill & J. 25; *Chipman v. Morrill*, 20 Cal. 130; *Snyder v. Kirtley*, 35 Misso. 423.

⁶ *Fowler v. Donovan*, *supra*.

⁷ *Robertson v. Deatherage*, *supra*.

⁸ *Wells v. Miller*, *supra*; *Craven v. Freeman*, 82 N. C. 361; *Scofield v. Gaskill*, 60 Ga. 277; *Healey v. Scofield*, 60 Ga. 450; *Crayton v. Johnson*, 27 Ala. 503.

⁹ *Ante*, § 59.

¹⁰ *Nichols v. Nowling*, 82 Ind. 488; *Miller v. Fenton*, 11 Paige, 18; *Vose v. Grant*, 15 Mass. 505, 521; *Hunt v. Lane*, 9 Ind. 248.

¹¹ *Merryweather v. Nixan*, 8 T. R. 186, Lord Kenyon, C. J. observing, "This decision would not affect cases of indemnity, where one man employed another to do acts not unlawful in themselves for the purpose of asserting a right;" *Betts v. Gibbins*, 2 A. & E. 57, 74, Lord Denman, C. J. observing, "The general rule is that between wrong-doers there is neither indemnity nor contribution, the exception is where the act is not clearly illegal in itself."

vail, therefore contribution may be enforced, against a party not within its reason; that is, not knowing the facts which render him a wrong-doer, so deemed such only by implication of law.¹

§ 217. **Benefit accepted.** — Any benefit, of a sort commonly the subject of pecuniary compensation, which one, not intending it as a gift,² confers on another who accepts it, is, in the absence of any agreement in fact, an adequate foundation for the law's created promise to render back its value.³ There may be, in some special circumstances, actual or apparent deviations from this rule;⁴ but, if so, they will be obvious to the practitioner who takes his steps in the light of the reasons from which the rule proceeds, and they cannot well be formulated into an exception. To illustrate, —

§ 218. **Goods ordered.** — If one orders goods from a trader, or receives and uses them, but says nothing of pay, a promise to pay for them will be implied by law.⁵ Or, —

§ 219. **Work and Services.** — If he procures work or services from a person under no special ties of relationship or

¹ *Adamson v. Jarvis*, 4 Bing. 66; *Wooley v. Batte*, 2 Car. & P. 417; *Pearson v. Skelton*, 1 M. & W. 504; *Acheson v. Miller*, 2 Ohio State, 203; *Moore v. Appleton*, 26 Ala. 633. The doctrine seems to be, that, to take away the equitable right of enforcing contribution, there must be an evil intent similar to the element of intent in the criminal law, where an ignorance of fact of a sort to free one from culpability will excuse what otherwise would be punishable. 1 Bishop Crim. Law, § 301-303 *a*, and the note to the latter section. But the wrongful act need not be a crime. I have not seen the rule stated in these terms, yet such appears to be, at least, the philosophy of it. Post, § 481.

² Ante, § 210.

³ **Authorities and how regarded.** — In the nature of the law, this proposition, like multitudes of others which every competent law-writer introduces into his text-book, is not sustainable by a reference to any single authority. Ante,

§ 14-16, 19, 184, note. It is held, in the several cases, fragment by fragment; and only by putting together the fragments, and permitting the law's reasons to give them adherence, can we discover it as a compact whole. Bishop Written Laws, § 125. Among the authorities to some of the fragments are *Elder v. Hood*, 38 Ill. 533; *Adams v. Cosby*, 48 Ind. 153; *Watchman v. Crook*, 5 Gill & J. 239; *Morris v. Morris*, 4 Grat. 293; *Jones v. Woods*, 26 Smith, Pa. 408; *Morrison v. Jones*, 6 Bradw. 89; *Stanhop v. Ecquester, Latch*, 87; *Hathaway v. Winneshiek*, 30 Iowa, 596. The rest are interspersed with other matter throughout this entire chapter.

⁴ *Ross v. Hardin*, 79 N. Y. 84; *North Providence v. Dyerville Manuf. Co.* 13 R. I. 45; *Davis v. Breon*, 1 Ariz. 240; *Boston v. District of Columbia*, 19 Ct. of Cl. 31; *French v. Auburn*, 62 Maine, 452.

⁵ *Met. Con.* 4; *Weatherby v. Banham*, 5 Car. & P. 228.

the like, or knowingly receives the benefit of them, the law creates the promise to pay for what he accepted to his own advantage.¹ But, —

§ 220. **Voluntary.** — If in the particular case it is shown that the services were not rendered for pay, but were voluntary, no payment for them can be recovered, however great the benefit conferred.² An instance of this occurs, for example, where two persons having dealings together are in the habit of doing for each other things not intended to be included in the accounts; the one who has done more than the other cannot enforce pay for the balance.³ Within this principle, —

§ 221. **Organization of Corporation.** — When a corporation is about to be organized, if one renders services therein, or otherwise does what, were it in existence, would create a debt from it to him, he cannot, on the organization being perfected, enforce payment from it. So far as it is concerned, what was done must be presumed to have been voluntary; for he could not expect pay from a body not in existence, nor could the law impose an obligation on a nonentity.⁴ So likewise, —

§ 222. **Extra Services.** — If one under a salary or other regular pay performs, without any express understanding as to compensation, duties in excess of what the contract of employment demands, they will be presumed to have been rendered under the contract or voluntarily, and the law will create no promise to pay for them.⁵ Something as to the

¹ *Moreland v. Davidson*, 21 Smith, Pa. 371; *Ford v. Ward*, 26 Ark. 360; *James v. Bixby*, 11 Mass. 34, 37; *In re Scott*, 1 Redf. 234; *Farmington Academy v. Allen*, 14 Mass. 172, 176; *St. Patrick's Church v. Abst*, 76 Ill. 252; *Camfrancq v. Pilie*, 1 La. An. 197; *Dougherty v. Whitehead*, 31 Misso. 255; *Hurst v. Hite*, 20 W. Va. 183; *McCrary v. Ruddick*, 33 Iowa, 521; *Reg. v. Doutre*, 9 Ap. Cas. 745; *Jones v. Woods*, 26 Smith, Pa. 408.

² *Force v. Haines*, 2 Harrison, 385; *White v. Jones*, 14 La. An. 681; *James*

v. O'Driscoll, 2 Bay, 101; *Watson v. Ledoux*, 8 La. An. 68; *Bartholomew v. Jackson*, 20 Johns. 28.

³ *Potter v. Carpenter*, 76 N. Y. 157; *Jared v. Vanvleet*, 13 Bradw. 334.

⁴ *Rockford, &c. Railroad v. Sage*, 65 Ill. 328; *Western Screw, &c. Co. v. Cousley*, 72 Ill. 531; *Marchand v. Loan and Pledge Assoc.* 26 La. An. 389.

⁵ *Levisse v. Shreveport City Railroad*, 27 La. An. 641; *Pew v. Gloucester National Bank*, 130 Mass. 391, 396.

case where there is an express promise may be derived from what is said in another connection.¹

§ 223. **Relationship.** — Where services on the one hand and board on the other are rendered between members of one family, particularly if the relation of parent and child exists, or where the head of the family stands *in loco parentis* to a member,² the law's promise of payment does not arise.³ The case of a brother and sister living together and constituting a family has been held to be within this rule.⁴ Yet an express contract to make compensation will be good;⁵ and, in special circumstances, not differing greatly, even an agreement for pay will be implied.⁶

§ 224. **Bequest in Payment.** — One rendering services understood to be gratuitous, yet with the hope of receiving in return a gift or bequest from the person served, cannot, on being disappointed, turn round and enforce pay; as, for example, by suing his executor.⁷ And there are English cases from which the doctrine seems even to go further; namely, that, though the party benefited expressly promises remuneration by a legacy, the meaning is that it shall depend on his mere pleasure, and the other will have no remedy should he break his promise and not make the legacy.⁸ But this interpretation is contrary to reason; since it leaves the parties precisely where they stood without the agreement, reducing

¹ Ante, § 48-50.

² Thorp v. Bateman, 37 Mich. 68; Ryan v. Lynch, 9 Misso. Ap. 18; Windland v. Deeds, 44 Iowa, 98; Smith v. Johnson, 45 Iowa, 308.

³ Harris v. Currier, 44 Vt. 468; Mariner v. Collins, 5 Harring. Del. 290; Cauble v. Ryman, 26 Ind. 207; Hertzog v. Hertzog, 5 Casey, Pa. 465; Hays v. McConnell, 42 Ind. 285; Daubenspeck v. Powers, 32 Ind. 42; Keegan v. Malone, 62 Iowa, 208; Cohen v. Cohen, 2 Mackey, 227; Houck v. Houck, 3 Out. Pa. 552; Wilson v. Wilson, 52 Iowa, 44; Greenwell v. Greenwell, 28 Kan. 675.

⁴ Taylor v. Taylor, 1 Lea, 83. The relationship of granddaughter has been

deemed not alone sufficient to rebut the presumed obligation to pay for services rendered in the grandfather's family. Hauser v. Sain, 74 N. C. 552.

⁵ Byrnes v. Clark, 57 Wis. 13; Medsker v. Richardson, 72 Ind. 323; Wence v. Wykoff, 52 Iowa, 644.

⁶ Ensey v. Hines, 30 Kan. 704; Morton v. Rainey, 82 Ill. 215.

⁷ Davison v. Davison, 2 Beasley, 246; Little v. Dawson, 4 Dall. 111; Lee v. Lee, 6 Gill & J. 316; Kennard v. Whitson, 1 Houston, 36; Le Sage v. Coussmaker, 1 Esp. 187.

⁸ Baxter v. Gray, 4 Scott N. R. 374, 3 M. & G. 771; Osborn v. Guy's Hospital, 2 Stra. 728.

it to a mere nullity. It is never permissible thus to interpret words away when another construction is obvious. And the law is well settled, both in England and this country, that a promise by one to make a will or devise in another's favor is, if in due form and on good consideration, binding.¹ Even such a promise may, in proper cases, be enforced in equity by a decree for specific performance.² Or, with us, however the rule may be in England, an action at law may, after the party dies without fulfilling his agreement, be maintained against his executor to recover the value of the services.³ And if there is a provision in the will, and it is sufficient to compensate for the services only in part, an action is maintainable against the executor for the residue.⁴

§ 225. **Distinguished.** — In the larger part of the foregoing illustrations of the contract which the law creates, there is no impossibility that, in truth, the party might have made the promise thus imputed to him, however plain it may be that he did not. But in other of the cases the fact of there being no promise is conclusive, and in still others its existence is impossible. Thus, —

§ 226. **Money wrongfully obtained.** — If, by fraud, duress, or any trespass, a man gets possession of another's money or other property, the law raises the promise to return the same, though plainly he did not mean to do it, and could not have so contracted in fact.⁵ Or, —

§ 227. **Labor of Apprentice.** — If a man knowingly entices

¹ *Graham v. Wickham*, 1 De G. J. & S. 474, 9 Jur. n. s. 702; *Hammersley v. De Biel*, 12 Cl. & F. 45; s. c. nom. *De Beil v. Thomson*, 3 Beav. 469; *In re Brookman's Trust*, Law Rep. 5 Ch. Ap. 182; *Loffus v. Maw*, 8 Jur. n. s. 607.

² *Mundorff v. Kilbourn*, 4 Md. 459; *Parsell v. Stryker*, 41 N. Y. 480. If two persons agree to make wills in each other's favor, a will made contrary to the agreement may be vacated by judicial decree. *Robinson v. Mandell*, 3 Clif. 169.

³ *Shakespeare v. Markham*, 10 Hun, 311, 322; *Eagan v. Kergill*, 1 Dem. 464; *Taylor v. Wood*, 4 Lea, 504; *Frost v.*

Tarr, 53 Ind. 390, 392; *Martin v. Wright*, 13 Wend. 460.

⁴ *Reynolds v. Robinson*, 64 N. Y. 589.

⁵ *Gilbert v. Ross*, 1 Strob. 287; *Hinsdill v. White*, 34 Vt. 558; *Pheteplace v. Eastman*, 26 Iowa, 446; *Swatara Railroad v. Brune*, 6 Gill, 41; *Gorman v. Carroll*, 7 Allen, 199; *Jamison v. Moon*, 43 Missis. 598; *Gordon v. Bruner*, 49 Misso. 570; *Hagaman v. Neitzel*, 15 Kan. 383; *McDonald v. Todd*, 1 Grant, Pa. 17; *McDonald v. Peacemaker*, 5 W. Va. 439; *Allen v. Burlington*, 45 Vt. 202; *Wilson v. Short*, 6 Hare, 366.

away, or takes by force, or harbors another's apprentice, the law creates a promise from him to the master to pay the latter for the services rendered by the apprentice.¹

§ 228. **Concurrent Remedies.** — In the cases mentioned in the last two sections there is generally a concurrent remedy by an action for the tort, which the injured party may have instead, if he chooses.² Again, —

§ 229. **Husband and Wife.** — Within a principle already mentioned,³ and by reason of the mutual dependence of husband and wife, no services which the one may render the other will be followed, at the common law, by any implied duty to pay; nor, except by force of some of our recent statutes, can either be bound to the other by an express promise.⁴ So, also, —

§ 230. **Parent and Minor Child.** — To a considerable extent, the same consequence attends the mutual transactions of parent and minor child.⁵ Yet there may be valid bargainings between them; even a father may be compelled, on his distinct, express promise, to pay wages to such child.⁶ And he may give the child his earnings⁷ or an article of property,⁸ so that he cannot reclaim them, or he may emancipate the child.⁹ The further consideration of this class of questions is not for this place.¹⁰

§ 231. **Medical Aid in Emergency.** — Should a medical practitioner be called by an unauthorized person to a man deprived of his senses by a blow, rendering immediate relief necessary to save life, duty would require it to be given. And, if he gave it, not in charity but expecting to be paid, the law would create a promise of payment from the patient,

¹ *Foster v. Stewart*, 3 M. & S. 191; *Lightly v. Clouston*, 1 Taunt. 112;

Eades v. Vandeput, 5 East, 39, note, 4 Doug. 1; *James v. Le Roy*, 6 Johns. 274.

² *Neate v. Harding*, 6 Exch. 349; *Blalock v. Phillips*, 38 Ga. 216; *International Bank v. Monteath*, 39 N. Y. 297; *Stuart v. Simpson*, 1 Wend. 376.

³ *Ante*, § 204–209.

⁴ 1 *Bishop Mar. Women*, § 883,

886, 887; 2 *Ib.* § 438, 456, and other places.

⁵ 2 *Kent Com.* 189 et seq.

⁶ *Titman v. Titman*, 14 Smith, Pa. 480; *Wilson v. McMillan*, 62 Ga. 16.

⁷ *Monaghan v. School District*, 38 Wis. 100.

⁸ *Smith v. Smith*, 7 Car. & P. 401.

⁹ *Farrell v. Farrell*, 3 Houst. Del. 633.

¹⁰ *Ante*, § 223; post, § 892–946.

who, in fact, not even asked for the aid, or consented to its being rendered;¹ being incapable of asking or consenting.² So, —

§ 232. **Necessaries to Insane Person.** — In any case of insanity, one who, whether by formal agreement with the insane person or not, in good faith furnishes him with “necessaries,” — being things required for his sustenance or comfort, and suitable to his means, condition, and habits of life, — can, if he is not otherwise supplied, recover of him, on a promise which the law will imply, what they are reasonably worth. Were the law “not so, the insane might perish.”³ Even expenditures and services for the protection of his estate may be included in this class.⁴ Thus, —

§ 233. **Benefit to Insane Person's Estate.** — Though a contract with an insane person is, as a contract, void or voidable, there is a doctrine not quite uniformly held by the tribunals, and to be further explained in another chapter,⁵ to the effect that, if the other party does not know of the insanity, and confers on him or his estate a substantial benefit by executing what was in good faith supposed to be a valid agreement, and the parties cannot, on a rescission of such agreement, be placed *in statu quo*, he may be compelled to pay what the benefit conferred was worth.⁶

§ 234. **Necessaries to Infants.** — Though an infant (being any person under twenty-one years of age) has not the same power of contract as an adult, yet, if he is not provided for by his parents or otherwise, and is in want, one who, in response to his request, supplies him with necessaries can recover of him what they are worth, on a contract which the

¹ Ante, § 217.

² Arguendo, in *Richardson v. Strong*, 13 Ire. 106, 107.

³ *Sawyer v. Luffin*, 56 Maine, 308, 309; *Richardson v. Strong*, 13 Ire. 106; *Pearl v. McDowell*, 3 J. J. Mar. 658; *Skidmore v. Romaine*, 2 Bradf. 122; *Leach v. Marsh*, 47 Maine, 548; *Baxter v. Portsmouth*, 5 B. & C. 170; *Wentworth v. Tubb*, 1 Y. & Col. C. C. 171.

⁴ *Williams v. Wentworth*, 5 Beav. 325.

⁵ Post, § 969, 970.

⁶ *Wilder v. Weakley*, 34 Ind. 181; *Matthiessen & Weichers Refining Co. v. McMahon*, 9 Vroom, 536; *Lancaster National Bank v. Moore*, 28 Smith, Pa. 407; *Behrens v. McKenzie*, 23 Iowa, 333; *Ballard v. McKenna*, 4 Rich. Eq. 358; *Sims v. McLure*, 8 Rich. Eq. 286; *Dodds v. Wilson*, 1 Tread. 448; *Abbott v. Creal*, 56 Iowa, 175, 177. And see *Niell v. Morley*, 9 Ves. 478.

law will create.¹ One suing him on this promise has the burden of proving the circumstances rendering the things furnished, in the particular instance, necessities.² By the doctrine of some courts, denied by others, an infant in want, not emancipated or deserting his home, may in like manner charge his father for reasonable necessities;³ in many circumstances, by all opinions, he will be presumed to have authority from the parent.⁴

§ 235. **Necessaries to Wife.** — Whatever be the rule between parent and child, the duty of the husband to support the wife, while she is in the path of duty, is by all opinions absolute. And if, not being herself in the wrong, she is destitute through his neglect or refusal, the law will create a promise by him to pay any third person who may furnish necessities to her, at her request, directing them to be charged to him.⁵ Again, —

§ 236. **Saving Property.** — The duty to save the property of a third person is so absolute that he who does it in an emergency when otherwise it would be lost, not in mere voluntary kindness,⁶ but expecting to be paid, can recover from the owner compensation for his outlay or labor, on a contract created by law. If the owner had abandoned the article, and did not seek to reclaim it, the rule would be otherwise; for then it would belong to the finder.⁷ Finally, —

§ 237. **Burying the Dead.** — The duty of burying the dead is so absolute, and the necessity of its prompt discharge so urgent, that, if it is not done by those on whom it primarily rests, — for example, if a wife dies while the husband is out of the country and does not or cannot bury her, — any person

¹ *Parsons v. Keys*, 43 Texas, 557; *Met. Con.* 69; *Barnes v. Toye*, 13 Q. B. D. 410; *Wharton v. Mackenzie*, 5 Q. B. 606; *Gay v. Ballou*, 4 Wend. 403; *Hyman v. Cain*, 3 Jones, N. C. 111.

² *Wood v. Losey*, 50 Mich. 475; *Clarke v. Leslie*, 5 Esp. 28; *Wailing v. Toll*, 9 Johns. 141.

³ 2 Bishop Mar. & Div. § 528.

⁴ And see *Stanton v. Willson*, 3 Day, 37; *Keaton v. Davis*, 18 Ga. 457; *Gor-*

don v. Potter, 17 Vt. 348; *Weeks v. Merrow*, 40 Maine, 151; *Townsend v. Burnham*, 33 N. H. 270; *Kelley v. Davis*, 49 N. H. 187.

⁵ 1 Bishop Mar. & Div. § 553, 555, 565, 568 et seq., 578.

⁶ *Watson v. Ledoux*, 8 La. An. 68.

⁷ 2 Kent Com. 356; *Chase v. Corcoran*, 106 Mass. 286. See *Perkins v. Ladd*, 114 Mass. 420; *Boothe v. Fitzpatrick*, 36 Vt. 681.

in whose custody the dead body may be, or any other person, may give it decent burial according to the estate and condition of the deceased, and enforce payment of the person primarily obligated; as, in the case supposed, of the husband.¹ Where the primary duty rests on the estate of the deceased, so much of the expenses of the burial as cannot properly be postponed until after the appointment of an administrator² may, if he has assets, be recovered of him in his administrative capacity or personally; or, if after his appointment he neglects this duty, another may discharge it and enforce reimbursement in like manner. In all these cases, the contract for pay is created by the law.³ Always the funeral expenses are a proper subject of charge by the administrator against the estate;⁴ it is so even where it is insolvent, but they must be reasonable.⁵

§ 238. *The Doctrine of this Chapter restated.*

When a duty is cast upon one by a statute,⁶ or by "equity and good conscience" (the standard whereof is to be found in the books of the law rather than in those on moral science),⁷ or in any way by the law, whether statutory or common,⁸ — or, when one has been benefited by another who was discharging such duty,⁹ or responding to an imperative social call,¹⁰ under the anticipation of being paid,—or, again,

¹ *Jenkins v. Tucker*, 1 H. Bl. 90; *Ambrose v. Kerrison*, 10 C. B. 776; *Bradshaw v. Beard*, 12 C. B. N. s. 344.

² *Samuel v. Thomas*, 51 Wis. 549.

³ *Luscomb v. Ballard*, 5 Gray, 403, 405; *Hapgood v. Houghton*, 10 Pick. 154; *Tugwell v. Heyman*, 3 Camp. 298; *Corner v. Shew*, 3 M. & W. 350, 356; *Rogers v. Price*, 3 Y. & J. 28; *Myer v. Cole*, 12 Johns. 349; *In re Miller*, 4 Redf. 302.

⁴ *Clayton v. Somers*, 12 C. E. Green, 230; *Green v. Salmon*, 8 A. & E. 348.

⁵ *Steger v. Frizzell*, 2 Tenn. Ch. 369; *Hancock v. Podmore*, 1 B. & Ad. 260; *Yardley v. Arnold*, Car. & M. 434.

⁶ *Ante*, § 205; *Waller v. Kentucky*

Bank, 3 J. J. Mar. 201, 205; *Bath v. Freeport*, 5 Mass. 325; *Brigham v. Eveleth*, 9 Mass. 538; *Hillsborough v. Londonderry*, 43 N. H. 451.

⁷ *Howe v. Buffalo, &c. Railroad*, 37 N. Y. 297; *Turner v. Jones*, 1 Lans. 147; *Thompson v. Thompson*, 5 W. Va. 190; *Allen v. McKean*, 1 Sumner, 276, 317; *Wilson v. Sergeant*, 12 Ala. 778; *Gardiner Manuf. Co. v. Heald*, 5 Greenl. 381; *Brinckerhoff v. Wemple*, 1 Wend. 470; *Wilby v. Phinney*, 15 Mass. 116; *Stuart v. Lake*, 33 Maine, 87.

⁸ *Baker v. Thayer*, 3 Met. 312, 315; *ante*, § 204.

⁹ *Camden v. Mulford*, 2 Dutcher, 49.

¹⁰ *Hewett v. Bronson*, 5 Daly, 1.

has knowingly accepted something of value from another, who may be presumed to have been expecting compensation,¹ the law creates a promise from him to do the thing or pay for the benefit. Yet these propositions are to be accepted as in some degree limited and defined by what has been the course of the courts heretofore. In other words, the law creates a promise from one person to another, though none was in fact made, whenever such assumed promise is necessary as a foundation on which to enforce so much of natural, statutory, or common-law justice as comes within judicial cognizance. Hence, in the application of these principles, the court takes into view the equities of the individual case, what has been decided before, and the analogies to be drawn from the entire statutory and unwritten law ; being, however, in the main, guided by past decisions in like cases.

¹ *Day v. Caton*, 119 Mass. 513.

CHAPTER IX.

CONTRACTS IMPLIED FROM EXPRESS ONES.

§ 239. *Distinguished.* — The distinctions between the contracts of this chapter and those of the last and of the one next following are not always so obvious as we might wish, though in a part of the cases they are plain. And while commonly they are of little practical consequence,¹ there are contracts which will differ in legal effect according to the class into which they are interpreted. The reader, by carrying this fact in mind, may avoid misapprehensions.

§ 240. *Elsewhere.* — The interpretation of contracts is explained in a chapter further on.² The subject of this chapter is in one view a part of that, and the two may not unprofitably be read together.

§ 241. *Doctrine defined.* — The doctrine of this chapter is, that what is implied in an express contract is as much a part of it as what is expressed.³ It is the same doctrine which governs a statute.⁴

§ 242. *Why?* — Since in all language what the speaker supposes the hearer to understand is not expressed, yet the latter constitutes a part of the thought meant to be conveyed while the former composes the residue, it would be unreasonable to hold a contract as an exception, and it is not. The doctrine, therefore, is inherent in human speech. It would be futile for this chapter to undertake to exhaust the illustra-

¹ Ante, § 183, note.

² Post, § 365 et seq.

³ *Hudson Canal v. Pennsylvania Coal Co.* 8 Wal. 276. "It is a well known rule of law that every contract must be

construed as if those terms which the law will imply were expressly introduced into it." *Willes, J. in Whincup v. Hughes*, Law Rep. 6 C. P. 78, 84.

⁴ 2 Bishop Mar. Women, § 63.

tions of it, so just enough are here given to make the doctrine plain. Thus, —

§ 243. **Title to Thing sold — (Warranty).** — If one sells an article of personal property in his possession, as his own, and for a fair price, in law he also warrants the title.¹ But when he has it not in possession,² and in some other circumstances,³ there is no warranty of title implied. Moreover, —

§ 244. **Quality.** — The warranty by implication of law does not ordinarily extend to the quality of a chattel sold, even where the full price for a good article is paid.⁴ But, on this question, judicial opinions are not quite harmonious; some accepting the doctrine of the civil law, contrary to the common-law rule, that the taking of a sound price warrants the article sound.⁵ And the implied warranty of soundness may extend to things at sea, or otherwise not in a position to be inspected by the purchaser, and to sales by sample.⁶

¹ 2 Kent Com. 478; *Williamson v. Sammons*, 34 Ala. 691; *Linton v. Porter*, 31 Ill. 107; *Chancellor v. Wiggins*, 4 B. Monr. 201; *Defreeze v. Trumper*, 1 Johns. 274; *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Boyd v. Whitfield*, 19 Ark. 447; *Sherman v. Champlain Transp. Co.* 31 Vt. 162; *Costigan v. Hawkins*, 22 Wis. 74; *Fawcett v. Osborn*, 32 Ill. 411; *Word v. Cavin*, 1 Head, 506; *Dryden v. Kellogg*, 2 Misso. Ap. 87. See *Sparks v. Messick*, 65 N. C. 440. The English doctrine seems slightly different, and to imply a warranty of title only from special circumstances of a sale. *Morley v. Attenborough*, 3 Exch. 500; *Leake Con.* 105, 402, 403.

² *Lackey v. Stouder*, 2 Ind. 376; *Huntingdon v. Hall*, 36 Maine, 501; *Scranton v. Clark*, 39 N. Y. 220; *Scott v. Hix*, 2 Sneed, Tenn. 192; *Long v. Hickingbottom*, 28 Missis. 772.

³ *Richardson v. Tipton*, 2 Bush, 202; *The Monte Allegre*, 9 Wheat. 616; *Yates v. Bond*, 2 McCord, 382.

⁴ 1 Bishop Crim. Law, § 11; *Preston v. Dunham*, 52 Ala. 217; *West v. Cunningham*, 9 Port. 104; *Mason v. Chappell*, 15 Grat. 572; *Weimer v. Clement*,

1 Wright, Pa. 147; *Beninger v. Corwin*, 4 Zab. 257; *Johnston v. Cope*, 3 Har. & J. 89; *Penniman v. Pierson*, 1 D. Chip. 394; *Dean v. Mason*, 4 Conn. 428; *Boit v. Maybin*, 52 Ala. 252; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Jones v. Murray*, 3 T. B. Monr. 83; *Emerson v. Brigham*, 10 Mass. 197; *Moses v. Mead*, 1 Denio, 378, 5 Ib. 617; *Bartlett v. Hoppock*, 34 N. Y. 118; *Goldrich v. Ryan*, 3 E. D. Smith, 324; *Wright v. Hart*, 18 Wend. 449; s. c. in court below, nom. *Hart v. Wright*, 17 Wend. 267; *Holden v. Dakin*, 4 Johns. 421; *Jones v. Just*, Law Rep. 3 Q. B. 197, 202.

⁵ *Champneys v. Johnson*, 2 Brev. 268; *Rose v. Beattie*, 2 Nott & McC. 538; *Crawford v. Wilson*, 2 Mill, 353; *Barnard v. Yates*, 1 Nott & McC. 142; *Lester v. Graham*, 1 Mill, 182; *Missroon v. Waldo*, 2 Nott & McC. 76; *Mitchell v. Dubose*, 1 Mill, 360; *Thompson v. Lindsay*, 1 Tread. 236, 3 Brev. 305; *Toris v. Long*, Taylor, 17.

⁶ *Moore v. McKinlay*, 5 Cal. 471; *Getty v. Rountree*, 2 Chand. 28; *Fish v. Roseberry*, 22 Ill. 288; *Howard v. Hoey*, 23 Wend. 350; *Hanks v. Mc-*

§ 245. **Warranty of Note.** — If one sells a promissory note, the law implies the warranty that it is not forged, but genuine and binding on the parties,¹ and not subject to any legal defence.² Yet in the absence of fraud there is no warranty of the maker's solvency or ability to pay.³ So —

§ 246. **Faithfulness and Capacity.** — A person who undertakes a particular business contracts also, by implication, with his employer to integrity, care, and reasonable skill.⁴ Again, —

§ 247. **Warranty of Agency.** — One who enters into a contract with another as the agent of a third person, agrees also with the other, in matter of law, that he is such agent.⁵

§ 248. **In Conveyances of Land** — warranties are implied.⁶ Generally they may exist though there are express warranties also, but they cannot have an effect contrary to what is expressed.⁷ It will not be well here to enter into this learning; but, —

§ 249. **Bounded on Street.** — Where a deed bounds the land on one side by a way, it creates by implication the covenant that there is such a way.⁸

§ 250. **Implications from Particular Terms.** — In the illustrations thus far, the implied contract has, in the main, grown

Kee, 2 Litt. 227; *Waring v. Mason*, 18 Wend. 425; *Whittaker v. Hueske*, 29 Texas, 355; *Phelps v. Quinn*, 1 Bush, 375; *Merriam v. Field*, 24 Wis. 640.

¹ *Lobdell v. Baker*, 1 Met. 193; *Merriam v. Wolcott*, 3 Allen, 258; *Bell v. Cafferty*, 21 Ind. 411; *Tyler v. Bailey*, 71 Ill. 34. And see *Presbury v. Morris*, 18 Misso. 165.

² *Fake v. Smith*, 2 Abb. Ap. Dec. 76. And see *Thomas v. Bartow*, 48 N. Y. 193.

³ *Day v. Kinney*, 131 Mass. 37. And see *Graul v. Strutzel*, 53 Iowa, 712.

⁴ Met. Con. 5; *Stevens v. Walker*, 55 Ill. 151; *Zulkee v. Wing*, 20 Wis. 408; *Waul v. Hardie*, 17 Texas, 553; *Harmer v. Cornelius*, 5 C. B. n. s. 236; *Page v. Wells*, 37 Mich. 415; *O'Hara v. Wells*, 14 Neb. 403; post, § 1416.

⁵ *Collen v. Wright*, 7 Ellis & B. 301,

8 Ib. 647; *Baltzen v. Nicolay*, 53 N. Y. 467; *Spedding v. Nevell*, Law Rep. 4 C. P. 212; *Richardson v. Williamson*, Law Rep. 6 Q. B. 276; post, § 1120.

⁶ 4 Kent Com. 473. Yet not of title, it appears, in Georgia. *McDonald v. Beall*, 55 Ga. 288.

⁷ *Roebuck v. Duprey*, 2 Ala. 535; *Blair v. Hardin*, 1 A. K. Mar. 231; *Morris v. Harris*, 9 Gill, 19; *Gates v. Caldwell*, 7 Mass. 68; *Sumner v. Williams*, 8 Mass. 162, 201; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Kent v. Welch*, 7 Johns. 258; *Crouch v. Fowle*, 9 N. H. 219.

⁸ *Parker v. Smith*, 17 Mass. 413; *Emerson v. Wiley*, 10 Pick. 310, 315; *Tobey v. Taunton*, 119 Mass. 404; *Zearing v. Raber*, 74 Ill. 409; *Crowell v. Beverly*, 134 Mass. 98; *Burke v. Wall*, 29 La. An. 38.

out of the nature of the express one, or out of the sort of transaction. In other instances, it depends more on the interpretation of terms. Thus, —

§ 251. “House” — “Mill.” — In a grant or reservation, the word “house” or “mill” carries by implication the land on which it stands, being necessary to the enjoyment of the thing expressed.¹

§ 252. **Included in, or created as Consequence.** — The reader should distinguish² between the contracts of this chapter, where the thing implied is deemed an extension of the contract itself;³ and cases where, as in that of a deed-poll mentioned in the last chapter,⁴ the law creates, out of the act of acceptance, an independent promise. For the contracts of this chapter, the following, it is submitted, is —

§ 253. **The Rule.** — What comes by construction from an express contract has the same effect as if the matter thus interpreted into it stood therein in form; and it takes the degree of a specialty, of a written contract not under seal, or of an oral one, accorded to the part expressed. Thus, —

§ 254. **Statute of Frauds.** — Implications, created by construction, may be added to the words of a contract, to render it a sufficient writing under the Statute of Frauds.⁵ Again, —

§ 255. **Implied Covenants.** — Where covenants are implied in a deed — that is, come by construction from it — they are to be deemed as parts of the deed. The action for the breach of them is to be covenant and not assumpsit, and they are to be set out in the declaration in the same manner as if they were expressed.⁶

¹ *Bacon v. Bowdoin*, 22 Pick. 401, 406; *Webster v. Potter*, 105 Mass. 414, 415.

² *Ante*, § 239.

³ *Ante*, § 241.

⁴ *Ante*, § 202, 203. And see *Marryat v. Marryat*, 28 Beav. 224, 6 Jur. n. s. 572.

⁵ *Smith Con.* 2d Eng. ed. 53; *Hawes v. Armstrong*, 1 Bing. N. C. 761; *Fessenden v. Mussey*, 11 Cush. 127.

⁶ *Grannis v. Clark*, 8 Cow. 36; *Barney v. Keith*, 4 Wend. 502; *Shaeffer v. Geisenberg*, 11 Wright, Pa. 500; *Wood v. Hardisty*, 2 Collyer, 542.

§ 256. *The Doctrine of this Chapter restated.*

Like a statute or other law,¹ a contract must be interpreted by the court in order to, and in advance of, its enforcement. It is the interpreted stipulation, not its naked words, which in the trial of a cause the judge submits to the jury as the foundation for their verdict. Hence, of necessity, there is and can be no distinction between the parts set down in terms and those which the judge adds. The contract as shaped or to be shaped by judicial hands is the real undertaking between the parties, and the written or spoken words fill simply the office of helps to the tribunal in determining the contract.

¹ Bishop Written Laws, § 116.

CHAPTER X.

CONTRACTS IMPLIED AS OF FACT.

§ 257. **Not differ from Express.** — A contract which, as a question of fact, not of law, is implied, does not differ from an express one except in form of proof. But it is so often spoken of in our books as an implied contract that this separate mention of it becomes desirable. Moreover, —

§ 258. **Presumptions of Fact and Law mingle.** — In numerous cases, as actually presented to the tribunal, where the parties are capable, and are not affirmatively shown to have been averse to contracting, the two questions blend, — Did they enter into a contract in form? In the absence of any formal contract, shall one be presumed by the law? Therefore, in such a case, the jury pass upon the whole issue, under proper instructions from the court as to the law involved in the latter question.¹ But —

§ 259. **Actual Contract presumed.** — There are circumstances in which an express agreement, in distinction from an implied one, will, by the law or by the jury, be presumed as of fact.² Thus, —

§ 260. **Deed of Land.** — An actual conveyance of land, not in law possible except by writing under seal, will be presumed from a long possession which could have had no lawful origin without.³ And —

§ 261. **Marriage.** — The marriage status is created only

¹ *Chamberlin v. Donahue*, 44 Vt. 57; *Missis.* 628; *Boyle v. Parker*, 46 Vt. 343.
Whaley v. Peak, 49 Misso. 80; *Caulle*
v. Ryman, 26 Ind. 207; *Davenport v.*
Mason, 15 Mass. 85; *Belden v. Meeker*,
 47 N. Y. 307, 311; *Cock v. Oakley*, 50

² *Boothby v. Scales*, 27 Wis. 626.

³ *Lyon v. Reed*, 13 M. & W. 285, 303;
Whinnet v. Jones, 3 Moore & S. 472.

where the parties expressly agree to assume it. No court ever imposed it on them as of law. Yet, oftener than otherwise, it is shown in proof, not by witnesses to the contract, but by circumstantial evidence.¹ Still, —

§ 262. **Evidence.** — Questions of this sort belong rather to the department of evidence than of law. So it is deemed best to pursue the subject here no further.

§ 263. *The Doctrine of this Chapter restated.*

The contract treated of in this chapter is an express one, proved by circumstantial evidence. And, should the question whether it was in writing, or even whether it was under seal, be important, the affirmative of this also may be shown by the like evidence. Thus, to draw another illustration from the law of marriage, its existence may be presumed from circumstances, even under statutes which require minute formalities in its constitution. The form of the inquiry into the existence of this contract will vary with the cases; it does not admit of a universal rule. In some, the jury will be told that the presumption follows as of law from admitted facts; in others, they are to say whether or not, on the evidence, they believe that the alleged contract was made; and, in general, varying rules of law will enter into the question. These are particulars, not for this work, but for a book of evidence.

¹ 1 Bishop Mar. & Div. § 218, 219, 237, 482-518, 538.

CHAPTER XI.

ESTOPPEL AS A SPECIES OF CONTRACT CREATED BY LAW.

§ 264. Introduction.

265-269. In General.

270-273. By Judicial Record.

274-279. By Deed.

280-310. *In Pais*.

311. Doctrine of Chapter restated.

§ 264. **What for this Chapter and how divided.** — The doctrine of estoppel permeates the entire law, so not all of it pertains to contract. We shall take a mere glimpse of its larger outlines, but in the filling up shall endeavor to keep within those parts of the doctrine which enter into the subject of the volume; in the following order, I. In General; II. By Judicial Record; III. By Deed; IV. *In Pais*.

I. *In General*.

§ 265. **Defined.** — Estoppel is that principle of law by which, for putting an end to litigation, and otherwise for promoting justice, a fact once ascertained is, within limits which a long course of adjudication has prescribed, to be deemed settled, so that it cannot be inquired into afterward.¹

§ 266. **Beneficial.** — This doctrine has not unfrequently

¹ Coke's definition, followed in many of our later books, is not quite happily expressed; thus, "It is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Co. Lit. 352 a. Parsons observes, "We should say rather, that an

estoppel was an admission or a declaration which the law does not permit him who has made it to deny or disprove, for his own benefit, and to the injury of another." 2 Pars. Con. 787. My definition does not differ from these so much in meaning as in expression.

been decried as odious in the law, and therefore not to be favored.¹ But surely, if the law permitted men to be harassed by constant litigations of the same thing over and over, or suffered one to mislead another and then turn round and by proving himself a falsifier ruin him with the truth, it would merit no high commendation. And now equitable estoppels, if not others, are, at least by some tribunals, favored; because they prevent fraud and establish justice.² Undoubtedly our books show instances wherein, through some judicial perverseness, or something unfortunate in the particular case, the estoppel has not resulted beneficially; but so it is also of other beneficent doctrines of the law.

§ 267. **Between whom (Parties and Privies).** — Estoppels operate only between parties³ and their privies; strangers not being permitted to take advantage of them.⁴ Again, —

§ 268. **Mutual.** — They must be mutual, both parties being bound or neither.⁵ A common illustration is where a married woman, under the common-law disabilities, or a minor, not having capacity to make a lease of lands, executes one by indenture; here the lessee will not be estopped by his covenants, because the lessor is not.⁶ But this case might well be put on the ground that the lease is void.⁷ Another, from the old books, not admitting of being thus explained away, is that, “if a man takes a lease for years of his own lands by patent from the king,⁸ rendering rent, this shall not estop the lessee, as an indenture between common persons in such case would do; because the king cannot be estopped, . . . and if he

¹ *Lampon v. Corke*, 5 B. & Ald. 606, 611; *Leicester v. Rehoboth*, 4 Mass. 180; *Owen v. Bartholomew*, 9 Pick. 520, 527; *Abbot v. Wilbur*, 22 La. An. 368.

² *Post*, § 282; *The State v. Pepper*, 31 Ind. 76; *Buckingham v. Hanna*, 2 Ohio State, 551.

³ *Post*, § 310.

⁴ *McDonald v. Gregory*, 41 Iowa, 513; *Stoddard v. Burton*, 41 Iowa, 582; *Hill v. Morse*, 61 Maine, 541; *Simpson v. Pearson*, 31 Ind. 1; *Griffin v. Richardson*, 11 Ire. 439; *Massure v. Noble*,

11 Ill. 531; *Petrie v. Nuttall*, 11 Exch. 569, 575.

⁵ *Co. Lit.* 352 a; *Lansing v. Montgomery*, 2 Johns. 382; *Longwell v. Bentley*, 3 Grant, Pa. 177; *Chope v. Lorman*, 20 Mich. 327; *Schuhman v. Garratt*, 16 Cal. 100; *McDonald v. Gregory*, 41 Iowa, 513; *Stoddard v. Burton*, 41 Iowa, 582.

⁶ *Bac. Abr. Lease O*, p. 442; *James v. Landon*, Cro. Eliz. 36.

⁷ *Post*, § 279; *Sinclair v. Field*, 8 Cow. 543, 587; *Kercheval v. Triplett*, 1 A. K. Mar. 493.

⁸ *Post*, § 310.

be not estopped neither shall the lessee, because all estoppels ought to be mutual.”¹ Yet the law does not carry the doctrine of mutuality to extremes; as, for example, it is very familiar learning that a deed-poll estops the maker,² and so does a bond sealed only by one party,³ while still the grantee or obligee incurs no responsibility in form of specialty; his liability, if any, being on a promise created from him by the law.⁴ But on this promise, quite different in legal contemplation from one by deed, the law may found an estoppel;⁵ so that, though there is a sort of mutuality, it is imperfect.

§ 269. **Double Estoppel.**—“Estoppel against estoppel doth put the matter at large.”⁶

II. *By Judicial Record.*

§ 270. **Defined.**—An estoppel by judicial record occurs where there has been a litigation, and therein a matter pertaining to the question or the cause was admitted by the party or adjudged by the court; while the record of it remains unreversed, he cannot deny it either in the same proceeding, or in any other between the same parties.⁷ Coke further explains by saying, that “matters alleged by way of supposal in counts shall not conclude after nonsuit, otherwise it is after

¹ Bac. Abr. ut sup.

² Blake v. Tucker, 12 Vt. 39; Howard Mutual Loan, &c. Assoc. v. McIntyre, 3 Allen, 571.

³ Cole v. Raymond, 9 Gray, 217; Goodrich v. Bryant, 5 Sneed, Tenn. 325.

⁴ Ante, § 202, 203.

⁵ Johnson v. Thompson, 129 Mass. 398, 400.

⁶ Co. Lit. 352 b; Carpenter v. Thompson, 3 N. H. 204.

⁷ I believe this to be a fair epitomization (ante, § 184, note) of the law of the present sub-title, but nothing would be gained by any full citation of the numerous cases by comparison of which the definition is sustained. The reader can find them in more convenient form

in his digests. Yet the following may be helpful: Strong v. Irwin, 12 Neb. 446; Cleveland, &c. Railroad v. Mara, 26 Ohio State, 185; Morris v. Shannon, 12 Bush, 89; Irwin v. Nuckolls, 3 Neb. 441; Kenan v. Du Bignon, 46 Ga. 258; Degelos v. Woolfolk, 21 La. An. 706; Jenkins v. Rosenberg, 105 Ill. 157; Whitehurst v. Rogers, 38 Md. 503; Streeks v. Dyer, 39 Md. 424; Dorsey v. Thompson, 37 Md. 25; Watterson v. Lyons, 9 Lea, 566; Kennerty v. Etiwan Phos. Co. 17 S. C. 411; Hill v. Morse, 61 Maine, 541; Smith v. Denman, 48 Ind. 65; Baker v. Kerr, 13 Iowa, 384; Bender v. Belknap, 23 La. An. 764; Way v. Stebbins, 47 Mich. 296; Beals v. Hill, 58 N. H. 61; Mariner v. Milwaukee, &c. Railway, 26 Wis. 84.

judgment given. And after nonsuit, albeit the supposal in the count shall not conclude, yet the bar, title, replication, or other pleading of either party, which is precisely alleged, shall conclude.”¹

§ 271. **Not for this Place.** — A full exposition of the subject of this sub-title would occupy much space with what, in the main, would be remote from the law of contracts. But something relevant may be set down under it; such as, —

§ 272. **Recovering back Money.** — Though, in the ordinary case of money paid under compulsion while not legally due, it can be recovered back by suit, it cannot be when the compulsion was by process of law. Then the remedy is to procure a reversion of the record; and, if this cannot be done, the injury is without remedy.² Again, —

§ 273. **Rescission of Contract.** — If, in a suit involving a contract, a party sets up that it is rescinded, and the case goes to judgment on such theory, he cannot in any subsequent litigation with the same party claim the right to carry it out as still operative.³

III. *By Deed.*

§ 274. **Defined.** — The doctrine of this sub-title is, that a seal when attached to a contract imparts to it the status of absolute verity, both as to the direct stipulations,⁴ and as to those recitals which in any way qualify it or give it effect,⁵

¹ Co. Lit. 352 b.

² Marriot v. Hampton, 7 T. R. 269, 2 Esp. 546.

³ Martin v. Boyce, 49 Mich. 122. On the same principle, one cannot both rely on the nullity of a judgment and have the proceeds of a sale under it. Blessey v. Kearny, 24 La. An. 289. And see, of the like sort, Flanigan v. Turner, 1 Black, 491; The Mary, 1 Mason, 365; Giles v. Halbert, 12 N. Y. 32; Bishop v. Fletcher, 48 Mich. 555.

⁴ Lit. § 667; Edwards v. Bailey, Cowp. 597, 601; Mytton v. Gilbert, 2

T. R. 169, 171; Jones v. Williams, 2 Stark. 52; Norton v. Sanders, 7 J. J. Mar. 12; Redman v. Bellamy, 4 Cal. 247; Harding v. Ambler, 3 M. & W. 279, 283; Douglass v. Scott, 5 Ohio, 194, 198.

⁵ Munroe v. Parkhurst, 9 Wend. 209; Cutler v. Dickinson, 8 Pick. 386; Bowman v. Taylor, 2 A. & E. 278, 290, 293; Lainson v. Tremere, 1 A. & E. 792; Coleman v. Bean, 14 Abb. Pr. 38; Wayman v. Taylor, 1 Dana, 527; Ottawa v. National Bank, 105 U. S. 342; Smith v. Burnham, 9 Johns. 306.

but not as to those which are merely collateral and immaterial.¹ The estoppel binds the parties in all controversies respecting the matter of the particular contract, and third persons as to whatever they claim under it, but neither third persons otherwise nor the parties as to any disconnected matter.² Thus, —

§ 275. **Consideration.** — Since the seal gives to the stipulations absolute verity, they need not be in fact, or purport to be, upon a consideration, — a doctrine which, with its modifications, has already been explained.³ The consideration, therefore, being immaterial, may, for any collateral purpose, as, for example, in a suit to recover the purchase-money of land conveyed by a deed in question,⁴ be inquired into;⁵ but it cannot be for the purpose of rendering the specialty void; for thereby the estoppel of the seal would be contradicted.⁶ Still, —

§ 276. **General and Particular.** — Estoppels are not created by implications, or by anything short of express terms, or, at least, their equivalents⁷ in meaning.⁸ In the words of Coke, they must “be a precise affirmation of that which maketh the estoppel.”⁹ It is common, therefore, to say, that general expressions will not suffice, there must be an affirmance of a particular thing.¹⁰ For example, —

¹ *Zimmler v. San Luis Water Co.* 57 Cal. 221; *Rhine v. Ellen*, 36 Cal. 362; *Osborne v. Endicott*, 6 Cal. 149; *Wallace v. Miner*, 6 Ohio, 366.

² *Ex parte Morgan*, 2 Ch. D. 72; *Carter v. Carter*, 3 Kay & J. 617, 4 Jur. n. s. 63; *Ostrander v. Hasbrouck*, 3 Johns. 331; *Carpenter v. Buller*, 8 M. & W. 209; *Ottawa v. National Bank*, 105 U. S. 342; *Taylor v. Needham*, 2 Taunt. 278; *Douglass v. Scott*, 5 Ohio, 194, 198; *Carver v. Astor*, 4 Pet. 1, 83; *Crane v. Morris*, 6 Pet. 598; *O'Neal v. Duncan*, 4 McCord, 246; *Breckenridge v. Ormsby*, 1 J. J. Mar. 236; *Clamorgan v. Greene*, 32 Misso. 285.

³ *Ante*, § 119–127; *Mann v. Eckford*, 15 Wend. 502, 520.

⁴ *Taggart v. Stanbery*, 2 McLean, 543; *Thompson v. Allen*, 12 Ind. 539;

Thayer v. Viles, 23 Vt. 494; *Schillinger v. McCann*, 6 Greenl. 364. I understand such to be the true doctrine, but there are cases adverse; as, *Mendenhall v. Parish*, 8 Jones, N. C. 105; *Hudson v. Critcher*, 8 Jones, N. C. 485.

⁵ *Ante*, § 75; *Irvine v. McKeon*, 23 Cal. 472.

⁶ *Ante*, § 124, note; *Farrington v. Barr*, 36 N. H. 86; *Goodspeed v. Fuller*, 46 Maine, 141.

⁷ *Ante*, § 241.

⁸ *Zimmler v. San Luis Water Co.* 57 Cal. 221; *Carroll v. Smith*, 111 U. S. 556.

⁹ *Co. Lit.* 352 b.

¹⁰ 2 *Smith Lead. Cas.* 2d ed. 457; *Shelley v. Wright*, Willes, 9; *Salter v. Kidley*, 1 Show. 58, where Lord Holt says, “General recital is not an estop-

§ 277. **Quitclaim Deed — Warranty.** — A quitclaim deed of lands carries, to the ordinary understanding, a strong implication that the grantor has some interest in them, but it affirms nothing of this in particular. So, though it passes whatever interest he may chance to have, it works no estoppel; and, should he afterward acquire a title, he may, under it, hold the lands against his former grantee the same as against any third person.¹ And the doctrine appears further to be, that even a deed which asserts a seisin and right to convey does not, within the principle of the last section, negative the existence of any paramount outstanding title, and so does not work an estoppel as against any such title, which the grantor may afterward obtain;² but it does estop him from setting up a title subsequently acquired inconsistent with his averment of present seisin and right to convey.³ A covenant of warranty in a deed of lands goes further. It contains within itself the assertion that there exists no adverse right or title, or possibility of title; so that, should the grantor afterward come into possession, by whatever means, of an adverse title or claim, the estoppel in his warranty will preclude his setting it up, and it will inure to the benefit of his grantee under this warranty. Such is the universal doctrine; the reasons for which, however, are not always stated in precisely these terms.⁴ In the immense variety of transactions, there

pel, but a recital of a particular fact is so.”

¹ Lit. § 446; *Weidman v. Hubble*, 1 Cow. 613; *Robertson v. Wilson*, 38 N. H. 48; *Kinsman v. Loomis*, 11 Ohio, 475; *McCrackin v. Wright*, 14 Johns. 193; *Harriman v. Gray*, 49 Maine, 537; *Bell v. Twilight*, 6 Fost. N. H. 401; *Pike v. Galvin*, 29 Maine, 183.

² *Allen v. Sayward*, 5 Greenl. 227. And see, as within this principle, *Doane v. Willcutt*, 5 Gray, 328.

³ *French v. Spencer*, 21 How. U. S. 228.

⁴ *Raines v. Walker*, 77 Va. 92; *Curran v. Burdsall*, 20 Fed. Rep. 835; *House v. McCormick*, 57 N. Y. 310; *Drake v. Root*, 2 Colo. 685; *Hannah*

v. Collins, 94 Ind. 201; *Comstock v. Smith*, 13 Pick. 116; *White v. Patten*, 24 Pick. 324; *Wark v. Willard*, 13 N. H. 389; *Churchill v. Terrell*, 1 Bush, 54; *Bush v. Marshall*, 6 How. U. S. 284, and multitudes of other cases. As to the English doctrine, see *Helps v. Hereford*, 2 B. & Ald. 242. The doubts, occasionally expressed, concerning this doctrine, have evidently their origin in the imperfect reasons for it sometimes assigned. Ante, § 12. But the real reasons — the law's reasons (ante, § 14-16) — are conclusive. It being established that, as between the parties and their representatives, the seal gives verity to the deed and its recitals, if, after a grantor has negatived under his seal, and thereby

are, on the one side and on the other, cases within the general range of this section, yet, in their particulars, not quite within any of these propositions. But the principles here stated will suffice for their solution.¹ Of course, a warranty in a deed which is unlawful and therefore void works no estoppel.²

§ 278. **Other Illustrations** — of the doctrine of estoppel by deed are numerous in the books; but the considerate reader, who alone has any just right to solicit from clients the charge of their legal interests, will have no difficulty in applying to the cases, as they arise in practice, the simple rules already stated and illustrated.

§ 279. **Double Reasons.** — Many conclusions of the law rest on two or more distinct reasons or lines of reasoning, any one of which will be adequate; and all of which would, if stated in a text-book together, be confusing to the reader. No thoughtful writer, when he assigns one reason and no more, means to be understood that no more exist. Some of the conclusions to be stated in our next sub-title are, where there is an instrument under seal, equally deducible from the doctrines of this.

IV. *In Pais.*

§ 280. **Importance.** — The specially-important part of the doctrine of estoppel, when viewed as a branch of the law of contracts, is termed, with equal propriety, estoppel by matter *in pais*, or equitable estoppel. It is of wide application and highly beneficial, even in many circumstances indispensable to justice.³

has estopped himself to deny, any and every present or *prospective* interest in the land (for such is the effect of the ordinary warranty), he was permitted to come in with a title afterward acquired and oust his grantee, the deed would be just as effectually overthrown as though his title were of a prior date. There is no room for doubt on this question.

¹ See, for example, *Collins v. Box*, 40 Texas, 190; *Gonzales v. Hukil*, 49 Ala. 260; *Way v. Arnold*, 18 Ga. 181;

Blanchard v. Ellis, 1 Gray, 195; *Pope v. Henry*, 24 Vt. 560; *Pratt v. Phillips*, 1 Sneed, Tenn. 543; *Teal v. Woodworth*, 3 Paige, 470; *Bush v. Person*, 18 How. U. S. 82; *Rigg v. Cook*, 4 Gilman, 336. These cases will suffice for illustration. Possibly not all were decided correctly, but the reader can judge for himself.

² *Atkinson v. Bell*, 18 Texas, 474; *Mytton v. Gilbert*, 2 T. R. 169; *Langan v. Sankey*, 55 Iowa, 52.

³ Ante, § 266.

§ 281. **Law or Equity.**—The estoppels of this class “are called equitable,” says a learned judge, “not because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just. Courts of equity recognize them in cases of equitable cognizance, but the courts of common law just as readily and freely; and it is never necessary to go into equity for the mere purpose of obtaining the benefit of an equitable estoppel, when the case is not otherwise of equitable jurisdiction.”¹ This is the general American doctrine,² but in a few of our States the courts seem inclined to give these estoppels a somewhat wider effect in equity than at law.³

§ 282. **Promote Justice.**—A leading doctrine, to which all the other doctrines of this sub-title are subordinate, is, that the purpose of the equitable estoppel is to prevent fraud and promote justice, and it will be applied only where such will be its effect.⁴ For example, it can be invoked neither in aid of a fraudulent scheme,⁵ nor in favor of one who has entrapped another into the admission set up to estop him.⁶

§ 283. **Quasi Contract, and how.**—This estoppel creates a species of contract, of the executed sort, therefore not requiring a consideration,⁷ and not commonly the foundation for a suit. Ordinarily, one simply stands upon it. And it resembles a specialty in that, as explained in the last sub-title, it cannot be contradicted. One of the distinctions seems to be, that, when a contract created by law is in the executed form, it is called an estoppel *in pais*; when it is executory, it is known by the other name.

¹ Cooley, J. in *Barnard v. German-American Seminary*, 49 Mich. 444.

² *Dickerson v. Ripley*, 6 Ind. 128. It would be useless to multiply authorities to this; they are cited, in sufficient numbers, in *Barnard v. German-American Seminary*, *supra*.

³ See, for example, *Kelly v. Hendricks*, 57 Ala. 193.

⁴ *Ante*, § 266; *Mills v. Graves*, 38 Ill. 455; *Thomas v. Bowman*, 29 Ill.

426; *McAfferty v. Conover*, 7 Ohio State, 99; *Ridgway v. Morrison*, 28 Ind. 201; *Buckingham v. Hanna*, 2 Ohio State, 551.

⁵ *Royce v. Watrous*, 73 N. Y. 597.

⁶ *Stanford v. Lyon*, 10 Stew. Ch. 94. And see *Rochester Ins. Co. v. Martin*, 13 Minn. 59; *Thorne v. Mosher*, 5 C. E. Green, 257.

⁷ *Ante*, § 81.

§ 284. **Defined.** — The doctrine is, that, whenever one person sustains to another a relation wherein social or legal duty demands of him to disclose a fact, and, either by silence or by words, he wilfully, or even through culpable carelessness, misleads the other, who in reliance thereon does some act detrimental but for such fact, the fact will, as between the parties and persons claiming under them,¹ be conclusively held to be as thus represented.²

§ 285. **As to which.** — This definition embraces, in essence, the entire doctrine of the subject; and it is exactly adapted to the more numerous class of cases. But, for cases of other classes, some other expression would better cover the special form of the facts; as, for example, —

Assumed or recited in Contract. — If parties contracting,

¹ Ante, § 267.

² The Minnesota court has defined: "An estoppel *in pais* arises when one, by his acts or representations, or by his silence when he ought to speak out, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and such other rightfully acts, on the belief so induced, in such manner that, if the former be permitted to deny the existence of such facts, it will prejudice the latter." Pence v. Arbuckle, 22 Minn. 417; Hawkins v. Methodist Episc. Ch. 23 Minn. 256. In England: "A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." Lord Denman, C. J. in Gregg v. Wells, 10 A. & E. 90, 98. As to which, and the less comprehensive defining in Pickard v. Sears, 6 A. & E. 469, 474, see the observations of Parke, B. in Freeman v. Cooke, 2 Exch. 654, 662, 663. Again: "If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts, by conduct of culpable negligence calculated to have that result, and such culpable

negligence has been the proximate cause of leading and has led the other to act, by mistake, upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist." Brett, J. in Carr v. London, &c. Railway, Law Rep. 10 C. P. 307, 318. And see Phillips v. Im Thurn, Law Rep. 1 C. P. 463; Continental Bank v. Commonwealth Bank, 50 N. Y. 575; Helmsley v. Loader, 2 Camp. 450; Lipscombe v. Holmes, 2 Camp. 441; O'Brien v. Wetherell, 14 Kan. 616; Gotham v. Gotham, 55 N. H. 440; Richmond v. Dubuque, &c. Railroad, 33 Iowa, 422; Carroll v. Manchester, &c. Railroad, 111 Mass. 1; Connihan v. Thompson, 111 Mass. 270; Mercer Mining and Manuf. Co. v. McKee, 27 Smith, Pa. 170; Hooker v. Hubbard, 102 Mass. 239; Eaton v. Winnie, 20 Mich. 156; Kuhl v. Jersey City, 8 C. E. Green, 84; Payne v. Burnham, 62 N. Y. 69; Conrad v. Callery, 22 La. An. 428; Barnard v. Campbell, 55 N. Y. 456; Baltes v. Ripp, 1 Abb. Ap. Dec. 78; Lacy v. Wilson, 24 Mich. 479; Timon v. Whitehead, 58 Texas, 290; Cowles v. Bacon, 21 Conn. 451; Taylor v. Ely, 25 Conn. 250.

even without seal,¹ recite or otherwise assume, by the written or oral words which constitute the contract, facts serving to qualify or limit it or its effect or interpretation, each, together with those claiming under him, as against the other and his legal representatives, is estopped to deny such facts in any controversy under the contract.² But this defining is in substance the same as our larger definition; for here there is a mutual duty to disclose the facts, each states them to the other, who acts upon them; and, if they are not true, one is misled to his injury; hence the law holds them conclusively to be true. Again, —

§ 286. **Accepting Benefit.** — One who accepts a benefit is thereby estopped to deny the existence or validity of that in return for which it came to him.³ Thus, a person who receives and retains purchase-money affirms the sale.⁴ One who takes the damage-money for laying out a way over his land is precluded from questioning the validity of the laying-out proceedings.⁵ A person who has received from a corporation a loan, and secured it by a mortgage, cannot on a foreclosure suit deny the power of the corporation to make the loan.⁶ The taking of what is given under an award estops the taker to controvert its validity.⁷ And if the licensing power under liquor laws receives the fee and approves

¹ Ante, § 274, 279; *Carpenter v. Buller*, 8 M. & W. 209, 212.

² This definition, like all the rest, comes less from a single case than from the combined cases, ante, § 217, note; such as *Moale v. Baltimore*, 56 Md. 496; *Hunter v. Miller*, 6 B. Monr. 612; *Drury v. Fay*, 14 Pick. 326; *Dikeman v. Norrie*, 36 Cal. 94; *Palmer v. Smith*, 10 N. Y. 303, 306; *Lewis v. Hodgdon*, 17 Maine, 267; *Sinclair v. Murphy*, 14 Mich. 392; *Loffus v. Maw*, 8 Jur. n. s. 607; *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475; *Phenix Ins. Co. v. Findley*, 59 Iowa, 591; *Du Val v. Marshall*, 30 Ark. 230; *Hall v. Harris*, 16 Ind. 180; *Depew v. Limestone Bank*, 1 J. J. Mar. 378. The truth of the definition appears also from a comparison of various propositions interspersed throughout

this title. And compare specially with ante, § 274.

³ *Hall Manuf. Co. v. American Ry. Sup. Co.* 48 Mich. 331; *Miller v. McManis*, 57 Ill. 126; *Helena v. Turner*, 36 Ark. 577; *Bynum v. Miller*, 86 N. C. 559; *Hardigree v. Mitchum*, 51 Ala. 151; *Stone v. Gilman*, 58 N. H. 135; *Hooker v. Hubbard*, 102 Mass. 239.

⁴ *Maple v. Kussart*, 3 Smith, Pa. 348; *Hathaway v. Payne*, 34 N. Y. 92, 103.

⁵ *Hartshorn v. Potroff*, 89 Ill. 509; *Chatterton v. Parrott*, 46 Mich. 432.

⁶ *Pancoast v. Travellers Ins. Co.* 79 Ind. 172. To the like effect, *St. Joseph Fire, &c. Co. v. Hauck*, 71 Misso. 465.

⁷ *Kellogg v. United States*, 1 Ct. of Cl. 310.

the bond, it cannot set up informalities to revoke the license.¹ These cases are, in effect, though not in form, within our general definition. Turning back to that definition,² and copying in substance its terms, we have the following. The parties, in these several cases, were under the mutual duty to deal honestly with the facts. The one who received the benefit affirmed, equally with the other, the truth of that in return for which it was given. And the latter, by bestowing it in reliance on the assumed fact, did an "act detrimental but for such fact;" that is, from which detriment will come to him if the fact is overthrown. Hence, as between the parties and those claiming under them, the fact must thereafter be conclusively held to be as thus affirmed.

§ 287. **Elements — Division of Subject.** — The elements of this estoppel, which together constitute it, and without which in combination, either formal or in essence, it cannot exist,³ are, First, Misrepresentation contrary to Duty; Secondly, Evil Intent therein; Thirdly, Reliance and Injurious Acting on the Misrepresentation. After considering them in their order, we shall add something concerning, Fourthly, The Elements in Combination; Fifthly, Further Views.

§ 288. **First. *Misrepresentation contrary to Duty:* —**

Duty — Relations of Parties. — One's misrepresentations estop him only when the circumstances make some sort of call on him for the truth.⁴ If, for example, he is asked about a thing by another who, as he reasonably supposes, has no interest in it, or intention of acting on the information, he is not estopped though he gives a false answer and the other does act thereon.⁵ And simply to refuse information will not necessarily work an estoppel where misleading the questioner would; as, to decline disclosing, to a person inquiring for his own guidance, the nature of one's title to property in posses-

¹ Oshkosh v. The State, 59 Wis. 425.

² Ante, § 284.

³ Holmes v. Crowell, 73 N. C. 613; Barnard v. Campbell, 55 N. Y. 456; Copeland v. Copeland, 28 Maine, 525; Califf v. Hillhouse, 3 Minn. 311; Taylor v. Zepp, 14 Misso. 482; Eldred v.

Hazlett, 9 Casey, Pa. 307; Wooley v. Edson, 35 Vt. 214; Shaw v. Beebe, 35 Vt. 205.

⁴ Hambleton v. Central Ohio Railroad, 44 Md. 551.

⁵ Durant v. Pratt, 55 Vt. 270.

sion.¹ Information imparted must, to work an estoppel, be to one having some right to it;² or, if to the community at large, be appropriated by one having right. An illustration of the latter is where a party holds out as his agent or partner another who is not such in fact; he is estopped to deny the agency or partnership to one who in good faith deals with the person in that capacity.³ And the like rule applies to one who thus pretends to be himself a partner.⁴

§ 289. **Under Oath.** — It is held by some tribunals that, if one makes a disclosure in due form under oath, any other person having an interest is entitled to act thereon, and the former will be estopped, as to him, to deny its truth.⁵ Others do not so adjudge.⁶ The former doctrine is wholesome, and there would seem to be no principle of law forbidding it.

§ 290. **Words — Conduct — Silence.** — It is immaterial whether the misrepresentation is by words,⁷ or by conduct,⁸ or by silence where duty requires the person to speak.⁹

§ 291. **Nature of Misrepresentation.** — The misrepresentation, to work an estoppel, must be distinct and unequivocal,¹⁰ not admitting of an interpretation by which its effect would be less.¹¹ Further than this, nothing more appears to be required than that it should proceed from the purpose and produce the consequence about to be stated.

§ 292. **Secondly. Evil Intent: —**

Fraud. — The general doctrine is, that an equitable estoppel is the response of the law to a party's intentional fraud, com-

¹ *Cunningham v. Milner*, 56 Ala. 522.

² *Sullivan v. Park*, 33 Maine, 438.

³ *Thompson v. Toledo Bank*, 111 U. S. 529; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Airey v. Okolona Savings Inst.* 33 La. An. 1346.

⁴ *Kirk v. Hartman*, 13 Smith, Pa. 97.

⁵ *Ainsworth v. Miller*, 20 Kan. 220; *Cooley v. Steele*, 2 Head, 605; *Nelson v. Claybrooke*, 4 Lea, 687.

⁶ *Smith v. Cremer*, 71 Ill. 185; *Durant v. Pratt*, 55 Vt. 270.

⁷ *Kirkpatrick v. Brown*, 59 Ga. 450; *Sherrill v. Sherrill*, 73 N. C. 8.

⁸ *Boyce v. Kalbaugh*, 47 Md. 334; *Williams v. Wells*, 62 Iowa, 740; *Funk v. Newcomer*, 10 Md. 301; *Osborn v. Elder*, 65 Ga. 360; *Mayer v. Ramsey*, 46 Texas, 371.

⁹ *Hogan v. Brooklyn*, 52 N. Y. 282; *Walker v. Flint*, 3 McCrary, 507; *Broyles v. Nowlin*, 3 Baxter, 191; *Wilson v. Sherffbillich*, 30 Minn. 422; *Austin v. Loring*, 63 Misso. 19.

¹⁰ *Ante*, § 276.

¹¹ *Ware v. Cowles*, 24 Ala. 446; *Thompson v. Thompson*, 9 Ind. 323; *Tainter v. Winter*, 53 Maine, 348; *Canning v. Harlan*, 50 Mich. 320.

PELLING him to stand to the truth of that wherewith he meant to mislead another to his injury.¹ It may be deemed a branch of the wider rule, that no one shall rely, in a court of justice, on his own fraud as a ground either of action or defence.² The elements are —

§ 293. **Knowledge — (Mistake).** — Ordinarily, if a person is mistaken as to a fact, and states what he believes to be true, no estoppel will follow though an innocent party accepts and acts upon the erroneous utterance to his injury.³ And one's right to rely on such mistake of fact in bar of the estoppel has been supposed to extend also to a mistake of law;⁴ but, on the other hand, the better doctrine is believed to be, that, since every one is conclusively presumed to know the law, a misstatement of it cannot be assumed to have influenced the person to whom it was made, hence cannot constitute an estoppel.⁵ And —

§ 294. **Carelessness.** — One's gross carelessness may, as in the criminal law,⁶ supply the place of knowledge; so that ignorance, produced by the carelessness, will not take away the estopping effect of the misstatement. The commonly accepted rule is, that the carelessness, or negligence, must in degree be gross, or equivalent to actual or constructive fraud.⁷ Hence, —

§ 295. **Design to Mislead.** — Not in all circumstances need there be, to complete the estoppel, an actual purpose to mislead,⁸ however effective against the party such purpose would

¹ *Morgan v. Railroad*, 96 U. S. 716; *Blount v. Robeson*, 3 Jones Eq. 73; *Dorlarque v. Cress*, 71 Ill. 380; *Sutton v. Wood*, 27 Minn. 362; *Bailey v. United States*, 15 Ct. of Cl. 490.

² *Montefiori v. Montefiori*, 1 W. Bl. 363; *Roberts v. Roberts*, 2 B. & Ald. 367, 368; *Holman v. Johnson*, Cowp. 341, 343; *Jones v. Yates*, 9 B. & C. 532, 539.

³ *Fay v. Tower*, 58 Wis. 286; *Thrall v. Lathrop*, 30 Vt. 307; *Turner v. Ferguson*, 58 Texas, 6; *Clinton v. Haddam*, 50 Conn. 84; *Colbert v. Daniel*, 32 Ala. 314; *Davis v. Davis*, 26 Cal. 23; *Keys v. Test*, 33 Ill. 316; *Holmes v. Crowell*,

73 N. C. 613; *Steele v. Putney*, 15 Maine, 327; *Wright v. Thomas*, 26 Ohio State, 346.

⁴ *Newton v. Liddiard*, 12 Q. B. 925.

⁵ *Platt v. Scott*, 6 Blackf. 389; *Hart v. Bullion*, 48 Texas, 278. See *Mayer v. Ramsey*, 46 Texas, 371.

⁶ 1 Bishop Crim. Law, 303 a, note, 313 et seq.

⁷ *Brant v. Virginia Coal, &c. Co.* 93 U. S. 326; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Mayer v. Erhardt*, 88 Ill. 452; *Sutton v. Wood*, 27 Minn. 362; *Bailey v. United States*, 15 Ct. of Cl. 490.

⁸ *Beebe v. Wilkinson*, 30 Minn. 548.

be in some other cases. If, for example, he was under a duty to speak, of a sort suggesting to extreme caution, and he knew that the other party was relying on his statement in a matter of great pecuniary importance, he would be specially obligated to avoid mistake; and, whenever justice in the particular instance required, would be estopped, however free from intentional blame his conduct. Where the result thus depends on varying complications of facts, there cannot be for it an exact rule.¹ If, to illustrate one aspect of the question, a person contemplating the purchase of another's note applies to him and is told there is no defence thereto, such maker, if fully informed of the reasons for the inquiry, will be estopped to set up against the purchaser a defence however just in itself, and however honestly he misled the other.² It is the same when one thus acknowledges, for a like purpose, his signature to what proves to be a forgery.³

§ 296. Thirdly. *Reliance and Injurious Acting on the Misrepresentation* : —

In General. — The estoppel takes place only when the party to whom the misrepresentation is made relies and acts upon it to what, but for the estoppel, would be his injury; or, as the expression sometimes is, “to the injurious altering of his position.”⁴ If the one complaining knew the facts, and proceeded on his knowledge, and not on what the other said, there is no estoppel.⁵ And it is the same where the act was one of submission to a supposed superior authority.⁶ Indeed,

¹ Compare *Coleman v. Pearce*, 26 Minn. 123; *Winslow v. Cooper*, 104 Ill. 235; *Gilbert v. Groff*, 28 Hun, 50; *Blair v. Wait*, 69 N. Y. 113; *Tiffany v. Anderson*, 55 Iowa, 405; *Raley v. Williams*, 73 Misso. 310; *Farley v. Pettes*, 5 Misso. Ap. 262; *Preston v. Mann*, 25 Conn. 118; *Andrews v. Lyons*, 11 Allen, 349.

² *Simpson v. Moore*, 5 Lea, 372; *Hoover v. Kilander*, 83 Ind. 420; *Carey v. Dunsmore*, 58 N. H. 357; *Plummer v. Farmers Bank*, 90 Ind. 386.

³ *Leach v. Buchanan*, 4 Esp. 226, 228.

⁴ *Wythe v. Salem*, 4 Saw. 88; *Free-*

man v. Cooke, 2 Exch. 654; *Brown v. Wheeler*, 17 Conn. 345; *Preston v. Mann*, 25 Conn. 118; *Heath v. Derry Bank*, 44 N. H. 174; *Wilson v. Cobb*, 1 Stew. Ch. 177; *Holmes v. Crowell*, 73 N. C. 613; *Morgan v. Railroad*, 96 U. S. 716; *Murray v. Mann*, 2 Exch. 538; *Watson v. Poulson*, 15 Jur. 1111; *Midland Railroad v. Hitchcock*, 10 Stew. Ch. 549; *Johnson v. Byler*, 38 Texas, 606.

⁵ *McCune v. McMichael*, 29 Ga. 312.

⁶ *Jersey City v. The State*, 1 Vroom, 521.

want of previous knowledge of the facts, good faith, believing what is falsely represented to be true, and acting on the erroneous belief thus induced, are, severally and conjointly, indispensable elements.¹

§ 297. Fourthly. *The Elements in Combination*:—

Illustrations. — It is proposed now to give some illustrations of estoppels created by the combined action of the foregoing elements. Thus, —

§ 298. **Own Property sold.** — If one discovers that his own property, real or personal, is being sold by a third person to another who is about to purchase it in ignorance of any defect in the title, the duty due from every man to every other demands of him to make known his ownership. Then, if he does not, and especially if he entices the purchaser to buy, or if he is guilty of any other deceit or neglect amounting to a fraud, in consequence of which the purchase is made, he is estopped ever after to claim the property; so that practically the purchaser gets a good title.²

§ 299. **Other like Cases.** — The cases similar to the foregoing, or depending on like principles, are apparently limitless in number and aspect. Thus, after one has sold as his own another's chattel, if the owner collects to his own use a note which he knows the purchaser gave for it, he is estopped to assert title to the chattel.³ One, bitten by a dog, inquired of another if he owned it. The latter, knowing that the ques-

¹ *Plummer v. Mold*, 22 Minn. 15; *Mass.* 270; *Burnell v. Maloney*, 39 Vt. 579.

Brant v. Virginia Coal, &c. Co. 93 U. S. 326; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Graves v. Blondell*, 70 Maine, 190; *Andrews v. Aetna Life Ins. Co.* 85 N. Y. 334; *Hambleton v. Central Ohio Railroad*, 44 Md. 551; *Mutual Life Ins. Co. v. Norris*, 4 Stew. Ch. 583; *O'Mulcahy v. Holley*, 28 Minn. 31; *St. Joseph Manuf. Co. v. Daggett*, 84 Ill. 556; *McAfferty v. Conover*, 7 Ohio State, 99; *Pounds v. Richards*, 21 Ala. 424; *Duell v. Bear River, &c. Co.* 5 Cal. 84; *Stanley v. Green*, 12 Cal. 148; *Carroll v. Manchester, &c. Railroad*, 111 Mass. 1; *Connihan v. Thompson*, 111

² 2 Bishop Mar. Women, § 487; *Winchell v. Edwards*, 57 Ill. 41; *Leeper v. Hersman*, 58 Ill. 218; *Davidson v. Silliman*, 24 La. An. 225; *Miller v. Springer*, 20 Smith, Pa. 269; *Dean v. Martin*, 24 La. An. 103; *Trowbridge v. Matthews*, 28 Wis. 656; *Swéezey v. Collins*, 40 Iowa, 540; *Funk v. Newcomer*, 10 Md. 301; *Sherrill v. Sherrill*, 73 N. C. 8; *Vilas v. Mason*, 25 Wis. 310; *Mason v. Williams*, 66 N. C. 564; *Gregg v. Wells*, 10 A. & E. 90; *Hardin v. Joice*, 21 Kan. 318; *Miles v. Lefi*, 60 Iowa, 168. See *Brown v. Tucker*, 47 Ga. 485.

³ *Moore v. Hill*, 85 N. C. 218.

tion was asked to ascertain who was liable, affirmed ownership; and he was held to be estopped from denying it when sued.¹ So where a party, answering a demand upon another for a thing, declares that he has it himself, thereby inviting an action against himself, he cannot thereon deny the possession.² If, on an irregularly issued execution, the defendant sees his property sold without protesting, he cannot claim the proceeds on the ground of the irregularity.³ And where one stands by while his personal effects are being converted by another in good faith,⁴ and, knowing all, does not protest, he is estopped from afterward claiming them.⁵ But, not to multiply this class of illustrations, —

§ 300. **Same as to Real Estate.**—One who, with full knowledge that the title to particular lands is in dispute, encourages another who is ignorant of the adverse claim to settle on and improve the lands, will not be permitted afterward to allege anything against the title.⁶ But if the person making im-

¹ Robb v. Shephard, 50 Mich. 189.

² Hall v. White, 3 Car. & P. 136.

As to which.—This case and the last carry the doctrine of estoppel in this particular direction quite as far as it will bear. Where, during the pendency of an action for a money judgment, the plaintiffs inquired of a third person, with a view to garnishee him, whether he owed the defendant, and he admitted an indebtedness, he was held not estopped to deny it on garnishment proceedings thereupon instituted. The court deemed that this case was not distinguishable from any other in which a person acknowledges an indebtedness and is then sued. "Yet," said Taylor, J., "we are forced to admit that the learned counsel has cited us to some decisions, and we have found one not cited, which seem to give countenance to that doctrine. Meister v. Birney, 24 Mich. 435; Finnegan v. Carraher, 47 N. Y. 493; Hall v. White, 3 Car. & P. 136. But, when examined, we think they fall far short of sustaining the views of the learned counsel for the respondent." Warder v. Baker, 54 Wis. 49, 54. The true distinction is believed to be, that if one in

the ordinary case simply concedes an indebtedness, either in general or in a particular sum, this is but *prima facie* evidence against him, and he is not estopped; but if, understanding that the inquiry is made with a view to a contemplated suit, he makes, not a general acknowledgment (ante, § 276), but a particular representation of some precise and essential fact, and the party brings his suit in reliance thereon, the estoppel takes effect. There may be circumstances in which the precise application of the doctrine will be open to dispute.

³ Slagel v. Murdock, 65 Misso. 522. A case somewhat similar is Austin v. Loring, 63 Misso. 19. Compare with Holmes v. Steele, 1 Stew. Ch. 173; Sellers v. Cheney, 70 Ga. 790; Tribble v. Anderson, 63 Ga. 31.

⁴ Ante, § 296.

⁵ Hogan v. Brooklyn, 52 N. Y. 282; Hentz v. Miller, 94 N. Y. 64.

⁶ McCormick v. McMurtrie, 4 Watts, 192; McKelvey v. Truby, 4 Watts & S. 323; Beaupland v. McKeen, 4 Casey, Pa. 124; Steel v. Smelting Co. 106 U. S. 447.

provements knows that he has no title,¹ he cannot invoke this rule for his protection.² The principle applies in all cases where an owner of real estate, in bad faith, sees another, in good faith, by the expenditure of money or otherwise, "injuriously altering his position"³ to it without protesting, or notifying him of the facts, even though he does not, and especially if he does, actively encourage him; such owner is estopped to allege afterward anything in conflict with the "injuriously altered position." The minor forms which this doctrine assumes in the varying cases are innumerable.⁴ One is —

§ 301. **Building on Land.** — Though a conveyance of land otherwise than by a writing under seal is ineffectual, still, under the doctrine of estoppel, if a father orally promises his son to deed to him a lot on his erecting a house upon it, the father is, when the house is built, estopped from setting up his title to the land as against the son.⁵ Even more broadly, if any one, claiming lands, stands by and sees another in good faith putting a building thereon, supposing them to be his own, and neither objects nor discloses his title, he cannot assert ownership afterward;⁶ or, should he afterward agree to a rent to be paid for the building, neither party can dispute the right of the builder to use the land.⁷ In like manner, —

§ 302. **Division Line.** — If adjoining proprietors recognize

¹ Ante, § 296.

² *Steel v. St. Louis Smelting, &c. Co.*, supra, at p. 456.

³ Ante, § 296.

⁴ *Griffin v. Lawrence*, 135 Mass. 365; *Evans v. Snyder*, 64 Misso. 516; *Fremont Ferry v. Dodge*, 6 Neb. 18; *St. Louis Smelting, &c. Co. v. Green*, 4 McCrary, 232; *Boyce v. Kalbaugh*, 47 Md. 334; *Wilson v. Vaughn*, 40 Iowa, 179; *Ross v. Thompson*, 78 Ind. 90; *Texas, &c. Railroad v. Jarrell*, 60 Texas, 267; *Slocumb v. Chicago, &c. Railroad*, 57 Iowa, 675; *Chicago, &c. Railroad v. People*, 91 Ill. 251. — **In Equity.** — Where, in these circumstances, improvements have been made on lands, equity will enforce a lien. "The doctrine proceeds upon the principle that

one person will not be permitted, in equity, to enrich himself by the loss or at the expense of another, when the loss would have been avoided had the former acted honestly and in good faith. His silence, in such case, is tantamount to a fraudulent concealment of his title, and to the extent that the party in possession has been thereby misled into the making of improvements that he otherwise would not have made, a court of equity grants relief by charging the value of the improvements as a lien upon the estate to which they have been added." *Boynton, J. in Preston v. Brown*, 35 Ohio State, 18, 28, 29.

⁵ *Campbell v. Mayes*, 38 Iowa, 9.

⁶ *Walker v. Flint*, 3 McCrary, 507.

⁷ *Mold v. Wheatcroft*, 27 Beav. 510.

a particular line as the true dividing one, and one of them erects improvements and maintains undisputed possession for many years, the other will be estopped though the line was erroneous, and the Statute of Limitations has not fully run.¹ The cases of this general sort vary in their particulars, but the proposition thus stated bears a leading part in their solution.² Once more, —

§ 303. **Witnessing Deed.** — It is no contradiction of the foregoing principles to hold, as the courts do, that one who subscribes his name as witness to a deed of lands is not presumed to know its contents; hence, though they should be his own, is not estopped thereby to claim them. But if his knowledge is affirmatively shown, it will work the estoppel.³ Again, —

§ 304. **Existence of Corporation.** — One cannot, in the same transaction, both affirm and deny the existence of a corporation; as, if he gives a note running to it, he is estopped, when called on for payment, to dispute its corporate being,⁴ and it is the same after he has made with it any other contract.⁵ On the other hand, a *de facto* corporation is estopped to deny, to those who deal with it, its corporate existence, though not that such existence has subsequently ceased.⁶ If there is fraud, it may modify these propositions.⁷ And —

§ 305. **Under Will.** — One accepting a benefit under a will is estopped from asserting a claim repugnant to its provisions.⁸ But in various circumstances, steps taken in apparent recog-

¹ *Majors v. Rice*, 57 Misso. 384. See *Day v. Caton*, 119 Mass. 513; *Columbet v. Pacheco*, 48 Cal. 395.

² *Hartung v. Witte*, 59 Wis. 285; *Hass v. Plautz*, 56 Wis. 105; *Cooper v. Vierra*, 59 Cal. 282; *Leonard v. Quinlan*, 121 Mass. 579; *Biggins v. Champin*, 59 Cal. 113.

³ *Coker v. Ferguson*, 70 Ala. 284; *Hale v. Skinner*, 117 Mass. 474.

⁴ *Nashua Fire Ins. Co. v. Moore*, 55 N. H. 48; *Tarleton v. Kennedy*, 21 La. An. 500; *White v. Ross*, 4 Abb. Ap. Dec. 589; *Stoutimore v. Clark*, 70 Misso. 471.

⁵ *Butchers, &c. Bank v. McDonald*, 130 Mass. 264; *Jones v. Kokomo Building Assoc.* 77 Ind. 340; *Newburg Petroleum Co. v. Weare*, 27 Ohio State, 343. See *Aller v. Cameron*, 3 Dillon, 198; *McCullough v. Talladega Ins. Co.* 46 Ala. 376; *Hungerford National Bank v. Van Nostrand*, 106 Mass. 559; *Mud Creek Draining Co. v. The State*, 43 Ind. 236.

⁶ *Dobson v. Simonton*, 86 N. C. 492.

⁷ *Doyle v. Mizner*, 42 Mich. 332; *Wallace v. Loomis*, 97 U. S. 146.

⁸ *Cox v. Rogers*, 27 Smith, Pa. 160. And see *Scholey v. Rew*, 23 Wal. 331.

dition of it will not preclude the party from contesting its validity.¹

§ 306. **Tenant as to Landlord's Title.** — The doctrine is familiar that a tenant, whether the letting is by a sealed instrument, or by writing not under seal, or by oral words, is estopped² to deny the landlord's title.³ In accepting the tenancy, he necessarily acknowledged the landlord's right; and the latter, relying on the acknowledgment, "injuriously altered his position." Hence the estoppel.⁴ But there are, connected with this question, considerable numbers of nice distinctions, to explain a part of which without the rest would not be advisable, and to elucidate all would take us too far from our main subject. Within the principle of this section, —

§ 307. **Other like Questions.** — A common carrier or other bailee of goods cannot ordinarily dispute the title of the person from whom he received them. But here also there are distinctions into which it is not necessary to enter.⁵ So a bank that has accepted money on deposit cannot generally dispute the depositor's title; but, as against the true owner, or an attaching creditor, it is otherwise.⁶ Likewise one to whom a sheriff has confided attached goods for safe keeping is estopped, when sued on his promise to redeliver them, to

¹ *Moore v. Johnson*, 7 Lea, 580; *Lee v. Templeton*, 73 Ind. 315; *Billings's Appeal*, 49 Conn. 456; *Darden v. Har- rill*, 10 Lea, 421.

² *Ante*, § 285.

³ *Knight v. Smythe*, 4 M. & S. 347; *Wills v. Stiles*, 1 Cow. 575; *Smith v. Stewart*, 6 Johns. 34; *Van Alen v. Vos- burgh*, 7 Johns. 186; *Colton v. Harper*, 5 Wend. 246; *Walden v. Bodley*, 14 Pet. 156, 162; *Moore v. Beasley*, 3 Ohio, 294; *Ingraham v. Baldwin*, 5 Selden, 45; *Towne v. Butterfield*, 97 Mass. 105; *Plumer v. Plumer*, 10 Fost. N. H. 558; *Newman v. Mackin*, 13 Sm. & M. 383; *Richardson v. Harvey*, 37 Ga. 224; *La- taillade v. Santa Barbara Gas Co.* 58 Cal. 4; *Parker v. Nanson*, 12 Neb. 419; *Providence County Saving Bank*

v. Phalen, 12 R. I. 495; *Gage v. Camp- bell*, 131 Mass. 566.

⁴ *Ante*, § 284, 285, 296.

⁵ *Story Bailm.* § 266, 582; *Wallace v. Matthews*, 39 Ga. 617; *Chicago, &c. Railroad v. Shea*, 66 Ill. 471; *Dodge v. Meyer*, 61 Cal. 405; *Nudd v. Montanye*, 38 Wis. 511. Contrary to the teachings of the American cases just cited, it was in the English Court of Common Pleas held that a carrier, by reason of the com- pulsory nature of his employment, is not estopped to dispute the title of him from whom he received the goods. *Sheridan v. New Quay Co.* 4 C. B. n. s. 618, 5 Jur. n. s. 248. The like as to a warehouseman was adjudged in *Ogle v. Atkinson*, 5 Taunt. 759.

⁶ *Lock Haven Bank v. Mason*, 14 Norris, Pa. 113.

set up that they were not liable to attachment.¹ The books are full of illustrations of this sort of doctrine.

§ 308. Fifthly. *Further Views*: —

Limitations of Doctrine. — The practitioner should carefully avoid overlooking any of the before-stated limitations of the general rules. And there may be others, to be found in the books, deserving of consideration. Still, in the jurisprudence of our country, this doctrine of equitable estoppel is advancing rather than receding; and it is believed that, if the facts of some of the cases to which it was not deemed applicable come afresh before another court in the same or another State, the result will be different. On a single yet vital question, there are a few cases, not old, which embody a most unfortunate retrograde, and which, therefore, should not be followed; thus, —

§ 309. **Land — Statute of Frauds.** — In these few cases, it is adjudged that the estoppel cannot operate to affect the title of lands, so as to work a transfer of them; because the Statute of Frauds requires all contracts or sales by which one is charged in respect of them to be in writing.² It is admitted that there is abundant authority the other way.³ Indeed, if a judge, when tempted to accede to this doctrine, will lay before him the title estoppel in any digest of reported cases old or new, he will see that he must overturn a large part of them to make the doctrine stand; in fact, must destroy half of the law of equitable estoppel, and not the less beneficent half, which the juridical wisdom of ages has built up to protect the innocent against the machinations of the wicked and crafty. The better doctrine is explained in a preceding chapter, wherein it is shown that the Statute of Frauds has no relation whatever to contracts created by law,⁴ among which the equitable estoppel may be included.⁵ The purpose of this statute

¹ *Smith v. Cudworth*, 24 Pick. 196.

² *Hayes v. Livingston*, 34 Mich. 384; *Kelly v. Hendricks*, 57 Ala. 193 (holding it to be so in a court of law, but there may be relief in equity); *Gimon v. Davis*, 36 Ala. 589; *De Mill v. Moffat*, 49 Mich. 125; *Wimmer v. Ficklin*, 14 Bush, 193.

³ *Brown v. Wheeler*, 17 Conn. 345; *Irion v. Mills*, 41 Texas, 310; *De Herques v. Marti*, 85 N. Y. 609; *Vicksburg, &c. Railroad v. Ragsdale*, 54 Missis. 200, 205.

⁴ *Ante*, § 193.

⁵ *Ante*, § 283.

is very different. And although our statutes for the recording of deeds of real estate might, on a superficial view, seem to be interfered with by this common-law estoppel, a little consideration will present the subject otherwise. Those statutes were not meant to enable a party to trace ownership in a lot of land simply by looking into the registry of deeds, with no inquiry *in pais*. Deaths, domestic and foreign marriages, births, domestic and foreign divorces, and estoppels go on, equally and alike, without the slightest regard to the register's record. And it is no more onerous, or contrary to the spirit of those statutes, while certainly it is not contrary to their letter, to compel a person looking up a title, to inquire into one of these matters *in pais* than into the others. To construe a statute expressly made for the suppression of fraud, as forbidding the courts to employ also for the same purpose one of the most effective and beneficial of all the common-law methods, is even to draggle justice herself in the mud.

§ 310. **The Parties.** — Ordinarily and by most opinions an estoppel does not take effect against the sovereign or State or United States.¹ But a legislative act or grant may estop the State.² And municipal³ and other corporations are as much within the law of estoppel as individuals.⁴ How it is with the privies we have seen.⁵

§ 311. *The Doctrine of this Chapter restated.*

Estoppel, which we have seen to be a species of contract created by law,⁶ is, together with the contract commonly bearing the latter name, to be ranked among the fictions of

¹ Ante, § 268; *The State v. Bevers*, 86 N. C. 588; *People v. Brown*, 67 Ill. 435; *Johnson v. United States*, 5 Mass. 425; *Wallace v. Maxwell*, 10 Ire. 110; *Candler v. Lunsford*, 4 Dev. & Bat. 407. Contra, *The State v. Ober*, 34 La. An. 359.

² *Commonwealth v. Pejepsut Proprietors*, 10 Mass. 155; *Commonwealth v. Andre*, 3 Pick. 224; *Enfield v. Permit*, 5 N. H. 280.

³ *Union Depot Co. v. St. Louis*, 76 Misso. 393; *Cook v. Harms*, 108 Ill. 151. See *Buena Vista v. Iowa Falls, &c. Railroad*, 46 Iowa, 226.

⁴ *Little Rock & Napoleon Railroad v. Little Rock, Mississippi River, &c. Railroad*, 36 Ark. 663; *Selma, &c. Railroad v. Tipton*, 5 Ala. 787; *Hale v. Union Mut. Fire Ins. Co.* 32 N. H. 295.

⁵ Ante, § 267.

⁶ Ante, § 283, 309.

the law. A legal fiction is a thing which the law, for the promotion of justice, for the convenience of litigation, or for any other adequate reason, assumes to be true, contrary to the real fact; and it will be given such form and be so restricted as not to work injustice, or contravene the purpose of its creation.¹ Therefore the estoppel takes place whenever, without it, the justice or order of the law would fail; and, where the matter pertains to contract, it operates as a species of contract created by the law. But as the measure of the law's justice and order is the collective conscience and understanding of the judiciary of all times, not those of a single judge, the limits of the doctrine are in the principles which from age to age have guided the judicial decisions. Moreover, as the law creates contracts which the parties have no capacity to enter into voluntarily,² so, by an estoppel, it may accomplish what they could not do voluntarily, even by deed.³

¹ Co. Lit. 150 *a*; *Mostyn v. Fabrigas*, Cowp. 161, 177; *Bennett v. Isaac*, 10 Price, 154; *Junk v. Canon*, 10 Casey,

Pa. 286; *Weisenfeld v. Mispelhorn*, 5 W. Va. 46.

² Ante, § 200-202.

³ 2 Bishop Mar. Women, § 488.

CHAPTER XII.

THE MUTUAL ASSENT.

§ 312-314. Introduction.

315-320. By Mutual Written or Spoken Words.

321-329. By Offer accepted in Terms.

330-333. By Offer acted upon.

334. Doctrine of Chapter restated.

§ 312. **Actual.** — Leaving the consideration of contracts created by law¹ and by estoppel,² we return to the actual ones. And —

§ 313. **Doctrine defined.** — The doctrine of this chapter is, that, to constitute a contract in fact, the two or more parties must concurrently assent³ to exactly the same thing at the same instant of time. So that, if one consents to a thing, and another to a thing in any degree different, or if the former consents at one time and the latter at another, by reason of which their wills do not at any instant completely coincide, they do not enter into a contract.⁴

§ 314. **How Chapter divided.** — The different methods of bringing the minds into concurrence indicate the division of the subject; namely, I. By Mutual Written or Spoken Words; II. By Offer accepted in Terms; III. By Offer acted upon.

I. By Mutual Written or Spoken Words.

§ 315. **Writing.** — If the thing to be done is set down in writing, the parties by signing and delivering it mutually consent to the same thing at the same instant. But, —

¹ Ante, § 181 et seq.

² Ante, § 264 et seq.

³ Hedge's Appeal, 13 Smith, Pa. 273; Gibbs v. Linabury, 22 Mich. 479.

⁴ Dickinson v. Dodds, 2 Ch. D. 463,

472; Cooke v. Oxley, 3 T. R. 653; Jordan v. Norton, 4 M. & W. 155; Allis v. Read, 45 N. Y. 142, 149; Hazard v. New England Marine Ins. Co. 1 Sumner, 218.

§ 316. **Meaning Uncertain.** — Should the written terms, though intended for a contract, be so incomplete, indistinct, or equivocal as, after applying to them all the helps which the rules of interpretation afford or permit, to leave it uncertain what it was to which the parties mutually consented, the consequence is the same as where there is no consent; there is no contract.¹ The illustrations of this are innumerable. Thus, if one stipulates to take of another a house on its being “put into thorough repair, the drawing-rooms to be handsomely decorated according to the present style, paint required both inside and out, although perhaps for some parts one coat might be sufficient,” it is impossible to say, with such precision as will enable a court to enforce the stipulation, how much or what either party meant; so, there being no evidence of the coincidence of their wills, there is no contract.² Still, —

§ 317. **Estopped to Deny.** — The words of the parties are the proper evidence of the mutual condition of their minds; and by them, irrespective of any secret purpose of one party, both will be bound.³ Though one should intend a mere imposition or fraud on the other who acts in good faith, he will be estopped to set up such intent, so that their mutual stipulations will constitute a valid contract⁴ “although,” as it has been expressed, “he intended only to prevaricate.”⁵

§ 318. **All or None.** — “There cannot be a contract without two parties.”⁶ And, though the consideration should be

¹ Ante, § 117; post, § 390; *Culver v. Culver*, 10 Vroom, 574; *Smith v. Crawford*, 81 Ill. 296; *Pepper v. Harris*, 73 N. C. 365; *Breaid v. Munger*, 88 N. C. 297; *Thompson v. Gordon*, 72 Ala. 455; *Barnett v. Nichols*, 56 Missis. 622; *Crooks v. Whitford*, 47 Mich. 283; *Moulton v. Egery*, 75 Maine, 485; *Dunkart v. Rineheart*, 89 N. C. 354; *Gigos v. Cochran*, 54 Ind. 593; *Krouskop v. Shontz*, 51 Wis. 204; *Hollen v. Davis*, 59 Iowa, 444; *Palmer v. Albee*, 50 Iowa, 429; *Brown v. Caldwell*, 23 W. Va. 187; *Sheedy v. Roach*, 124 Mass. 472; *Lind-*

say v. Lynch, 2 Sch. & Lef. 1, 7; *Ex parte Tootell*, 4 Ves. 372.

² *Taylor v. Portington*, 7 De G. M. & G. 328, 1 Jur. n. s. 1057.

³ *White v. Smith*, 37 Mich. 291; *Brunhild v. Freeman*, 77 N. C. 128.

⁴ *Cornish v. Abington*, 4 H. & N. 549; *Smith v. Hughes*, Law Rep. 6 Q. B. 597, 607.

⁵ *Todd v. Weber*, 95 N. Y. 181, 191.

⁶ *Sir James Mansfield, C. J. in Champion v. Plummer*, 1 N. R. 252, 254.

executed on one side, so that nothing remains to be done by one of them, the rule is necessarily universal that both must be bound or neither will be.¹

§ 319. **Informal and Preliminary.** — If parties agree on terms, however precise, “subject to the preparation and approval of a formal contract,” the concurrence of their wills is suspended; and, where nothing further is done, there is no contract.² Yet the mere fact that the reduction of an informal agreement, oral or written, to a formal written one was contemplated or stipulated for, does not prevent the former from taking immediate effect; the question whether it does or not depends on what the parties intended.³ Of course, in either case, if the contemplated formal contract is made, it alone will govern the parties.⁴

§ 320. **Other Questions** — properly within this sub-title are reserved for the next two chapters.

II. *By Offer accepted in Terms.*

§ 321. **Not accepted.** — A mere offer or promise, not accepted, involves no concurrence of wills, and it can never constitute a contract.⁵ But, —

¹ *Payne v. Cave*, 3 T. R. 148, 149; *Atkins v. Horde*, 1 Bur. 60, 120, 123; *McDonald v. Bewick*, 51 Mich. 79, 80; *Black v. Woodrow*, 39 Md. 194. See ante, § 77, 78. **Deed-poll.** — A deed-poll might seem at the first impression to be an exception to this rule, but it is not. Without acceptance by the grantee, — which, however, the law commonly presumes, — it passes nothing; and so, as the grantee is not bound, neither is the grantor. And see *Madan v. Sherard*, 73 N. Y. 329.

² *Winn v. Bull*, 7 Ch. D. 29. See *Hussey v. Horne-Payne*, 4 Ap. Cas. 311.

³ *Ridgway v. Wharton*, 6 H. L. Cas. 238, 4 Jur. n. s. 173; *Methudy v. Ross*, 10 Misso. Ap. 101; *Dietz v. Farish*, 53 How. Pr. 217, 222; *Wilson v. Lee's Summit*, 63 Misso. 137; *Bourne v. Shapleigh*, 9 Misso. Ap. 64; *Thomas v.*

Dering, 1 Keen, 729, 1 Jur. 211, 427; *May v. Thomson*, 20 Ch. D. 705; *Bonnewell v. Jenkins*, 8 Ch. D. 70, 74; *Montague v. Weil*, 30 La. An. 50; *Fredericks v. Fasnacht*, 30 La. An. 117; *Avendano v. Arthur*, 30 La. An. 316; *McDonald v. Bewick*, 51 Mich. 79.

⁴ *Sinclair v. Stevenson*, 2 Bing. 514, 1 Car. & P. 582; *Farquharson v. Barslow*, 4 Bligh, n. s. 560.

⁵ *Bower v. Blessing*, 8 S. & R. 243; *Bieber v. Beck*, 6 Barr, 198; *McKinley v. Watkins*, 13 Ill. 140; *Esmay v. Gorton*, 18 Ill. 483; *Brown v. Rice*, 29 Misso. 322; *Tuttle v. Love*, 7 Johns. 470; *Demoss v. Noble*, 6 Iowa, 530; *Bruce v. Pearson*, 3 Johns. 534; *Cornring v. Colt*, 5 Wend. 253; *Peru v. French*, 55 Ill. 317; *Quick v. Wheeler*, 78 N. Y. 300; *Taylor v. Shouse*, 73 Misso. 361; *Madan v. Sherard*, 73 N. Y.

§ 322. **Accepted.** — If one makes to another an offer, verbal or written, direct, by letter, or by telegram, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, adding no qualification, there is thus constituted a mutual consent to the same thing at the same time; in other words, a contract.¹ And the question of the sufficiency of the transaction to work this result is of law for the court.² On the other hand, —

§ 323. **Imperfect Acceptance.** — Though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations however slight, in time or otherwise, no contract is made.³ It is so, for example, where new terms are introduced; they constitute an offer on the other side, and leave the question open.⁴

§ 324. **Offer Incomplete.** — If the offer is in language not sufficiently certain⁵ for the stipulations to be enforced, or if what is written is to be construed as a mere opening of negotiations, no acceptance can transmute it into a contract.⁶

§ 325. **Offer withdrawn.** — Since an offer is not a contract, the party making it may withdraw it at any time before acceptance.⁷ Even though it is in writing, and by its terms is to stand open for a specified period, the result is the same.

329; *Harlow v. Curtis*, 121 Mass. 320; *Smith v. Weaver*, 90 Ill. 392.

¹ *Wells v. Milwaukee and St. Paul Railway*, 30 Wis. 605; *Abbott v. Shepard*, 48 N. H. 14; *Hart v. Bray*, 50 Ala. 446; *Calhoun v. Atchison*, 4 Bush, 261; *Duble v. Batts*, 38 Texas, 312; *Smith v. Colby*, 136 Mass. 562; *Cheaney v. Eastern Transp. Line*, 59 Md. 557; *Highland v. Rhoades*, 26 Ohio State, 411; *Johnson v. Talley*, 10 Lea, 248.

² *Robinson Machine Works v. Chandler*, 56 Ind. 575.

³ *Rommel v. Wingate*, 103 Mass. 327; *Barrow v. Ker*, 10 La. An. 120; *Bel-fast, &c. Railway v. Unity*, 62 Maine, 148; *Crossley v. Maycock*, Law Rep. 18 Eq. 180; *Bruner v. Wheaton*, 46 Misso. 363; *Eliason v. Henshaw*, 4 Wheat.

225; *Carr v. Duval*, 14 Pet. 77; *Moxley v. Moxley*, 2 Met. Ky. 309; *Smith v. Surman*, 9 B. & C. 561.

⁴ *Hussey v. Horne-Payne*, 8 Ch. D. 670, 678, 4 Ap. Cas. 311; *Derrick v. Monette*, 73 Ala. 75; *Baker v. Holt*, 56 Wis. 100; *Holland v. Eyre*, 2 Sim. & S. 194; *Routledge v. Grant*, 4 Bing. 653, 3 Car. & P. 267; *Falls Wire Manuf. Co. v. Broderick*, 12 Misso. Ap. 378; *Ashcroft v. Butterworth*, 136 Mass. 511; *Stagg v. Compton*, 81 Ind. 171.

⁵ Ante, § 316.

⁶ *Ahearn v. Ayres*, 38 Mich. 692; *Moulton v. Kershaw*, 59 Wis. 316; *Preston v. Luck*, 27 Ch. D. 497; *Chiodi v. Waters*, 1 Stark. 335.

⁷ *Cooke v. Oxley*, 3 T. R. 653; *Weiden v. Woodruff*, 38 Mich. 130; *Burton v. Shotwell*, 13 Bush, 271; *Tucker v.*

With no money consideration,¹ and no corresponding promise from the person to whom it is made, the promise not to withdraw it has no binding force.² If a consideration for the undertaking to leave the offer open is given and accepted, this constitutes of itself a contract, and the offer cannot be withdrawn.

§ 326. **Methods of Withdrawal.** — The ordinary method is by notice,³ but it may be done otherwise. Thus, disposing of a thing offered for sale is a withdrawal of the offer, nor in this case need the party be expressly notified. It is enough that he knows the fact.⁴ If the offer was made by mail, the mere posting of a counter letter, which does not arrive until after the former letter comes to hand and is answered by acceptance, will not suffice.⁵ And it appears to be now settled that, to effect a withdrawal, there must be actual knowledge or notice received.⁶ Moreover, —

§ 327. **Lapse of Time** — operates as a withdrawal. In the absence of time expressed or presumed from usage,⁷ the offer is to be construed as open for a reasonable time; then, when it has elapsed, an acceptance will be too late. What is a reasonable time will, it appears, depend on the particular case and its circumstances.⁸

§ 328. **By Letter or Telegram.** — One who makes an offer by mail or by telegraph constitutes thereby the post-office or telegraph company his agent for its transmission.⁹ Therefore, if it is not delivered, it amounts to nothing; or, if the telegram is altered in the transmission, he is bound by it as

Lawrence, 56 Vt. 467; *Quick v. Wheeler*, 78 N. Y. 300, 304.

¹ *Cherry v. Smith*, 3 Humph. 19.

² *Routledge v. Grant*, 3 Car. & P. 267, 4 Bing. 653; *Dickinson v. Dodds*, 2 Ch. D. 463; *Cheney v. Cook*, 7 Wis. 413; *School Directors v. Trefethren*, 10 Bradw. 127.

³ *Stevenson v. McLean*, 5 Q. B. D. 346.

⁴ *Dickinson v. Dodds*, 2 Ch. D. 463.

⁵ *Byrne v. Van Tienhoven*, 5 C. P. D. 344. And see *Stevenson v. McLean*, supra.

⁶ *Stevenson v. McLean*, 5 Q. B. D. 346, 351, 352; *Taylor v. Merchants Fire Ins. Co.* 9 How. U. S. 390; *Leake Con.* 43; *Pollock Con.* 10.

⁷ *Maclay v. Harvey*, 90 Ill. 525.

⁸ *Loring v. Boston*, 7 Met. 409; *Martin v. Black*, 21 Ala. 721; *Chicago and Great Eastern Railway v. Dane*, 43 N. Y. 240; *Mactier v. Frith*, 6 Wend. 103; *McCurdy v. Rogers*, 21 Wis. 197; *Stone v. Harmon*, 31 Minn. 512; *Dunlop v. Higgins*, 1 H. L. Cas. 381, 12 Jur. 295; *Judd v. Day*, 50 Iowa, 247.

⁹ *Leake Con.* 36, 37.

transmitted.¹ And if the receiver accepts the offer, the contract becomes complete on the delivery of the answer of acceptance at the post or telegraph office, nor is an actual receiving of it essential.² This result may be varied by the special terms of the offer; as, "if I do not hear from you," &c., making the actual receipt of it indispensable.³

§ 329. **Overt Act of Acceptance.** — A mere determination

¹ Saveland v. Green, 40 Wis. 431.

² Tayloe v. Merchants Fire Ins. Co. 9 How. U. S. 390; Trevor v. Wood, 36 N. Y. 307; Minnesota Oil Co. v. Collier Lead Co. 4 Dil. 431; Potter v. Sanders, 6 Hare, 1; Dunlop v. Higgins, 1 H. L. Cas. 381, 12 Jur. 295; Duncan v. Topham, 8 C. B. 225; Washburn v. Fletcher, 42 Wis. 152; Adams v. Lindsell, 1 B. & Ald. 681; Byrne v. Van Tienhoven, 5 C. P. D. 344. Compare with post, § 354.

³ Lewis v. Browning, 130 Mass. 173. From this case, and from McCulloch v. Eagle Ins. Co. 1 Pick. 278, therein cited, it appears that in Massachusetts the receipt of the answer is always deemed necessary. In Adams v. Lindsell, supra, the English court stated the reason for the common doctrine, thus: "If that [namely, the doctrine requiring the receipt of the answer] were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter." p. 683. Looking a little further into the reason, we have the following. When the person making the offer puts his letter into the post-office, he constitutes thereby, as said in the text, the post-office his agent for its

transmission. This proposition is not only sustained by the decisions; but, in the nature of things, any power which a man employs is his agent. To say that he employs the post-office, and to say that the post-office is his agent, are simply two forms of expressing the same idea. Equally, also, in asking, whether in terms or by implication, an answer by post, he makes the post-office his agent for bringing it to him. *Ex parte Cote*, Law Rep. 9 Ch. Ap. 27, 32. It is the same as though his written offer was sent by his clerk, and the request put into it to transmit the reply by the bearer. No one would doubt that, in this case, the delivery of the reply to his agent the clerk was in law a delivery to the principal. The fact that, in either case, the agent is forbidden to break the seal, makes no difference. Again, the contract consists of the two letters, constituting the offer and its acceptance. And the analogies derivable from the rules governing the signing and delivery of other written contracts conclusively show, that this one is complete when it is thus signed by both parties, and all of it in this finished form has by mutual consent been in the hands of one of them. A contract, not in duplicate, cannot be in the hands of both parties at the same time. Hence, in this case, the fact that, after the execution, a portion of this single contract is in the possession of one party and the remainder is on its journey to the other, can make no difference; the execution has, to repeat, already fully taken place. If the part which is on its travels is lost the consequence is simply the same as where any other executed writing is lost.

of the will to accept an offer does not constitute an acceptance; there must be words, written or spoken, or some other overt act.¹ The doing of a thing pursuant to an offer may be both an acceptance and performance.²

III. *By Offer acted upon.*

§ 330. **Doctrine defined.** — If one makes an offer to another, or to all persons in general, and does not withdraw it while the other person in the former case, or any one in the latter, goes forward and does the thing, such performance carries with it an acceptance of the offer; and the person who made it must pay or do what he proposed.³ A common case is that of —

§ 331. **Reward for Arrest, &c.** — Where a private person, or an official one acting under competent authority,⁴ publicly offers a given sum as a reward to any person who will make a particular arrest, or give information leading to it, or do any other like thing for the promotion of public justice or for any other lawful purpose, and one comes forward and does the act, the former or his principal may be compelled to pay. It is a contract entered into and executed by the act itself.⁵ But —

§ 332. **Withdrawn.** — Such offer, like any other, may be withdrawn before performance. If both it and the withdrawal were by public advertisement, one to be cut off from the reward need not have received actual notice.⁶

§ 333. **Goods Ordered.** — An illustration, so familiar as scarcely to attract notice, is that of goods ordered of a trader

¹ *White v. Corlies*, 46 N. Y. 467; *Trevor v. Wood*, 36 N. Y. 307; *Houghwout v. Boisubin*, 3 C. E. Green, 315.

² *Post*, § 330, 331; *Brusle v. Thomas*, 7 La. An. 349; *Woodworth v. Wilson*, 11 La. An. 402; *Street v. Chapman*, 29 Ind. 142.

³ *Reif v. Paige*, 55 Wis. 496; *Springer v. Cooper*, 11 Bradw. 267.

⁴ *Hungerford v. Moore*, 65 Ala. 232; *Hugill v. Kinney*, 9 Oregon, 250.

⁵ *Janvrin v. Exeter*, 48 N. H. 83;

Davis v. Munson, 43 Vt. 676; *Thatcher v. England*, 3 C. B. 254; *Loring v. Boston*, 7 Met. 409, 411; *Tarner v. Walker*, Law Rep. 2 Q. B. 301; *England v. Davidson*, 11 A. & E. 856; *Shuey v. United States*, 92 U. S. 73. See *Babcock v. Raymond*, 2 Hilton, 61; *Hayden v. Souger*, 56 Ind. 42.

⁶ *Shuey v. United States*, 92 U. S. 73. As to whether there need be any publication, see *Auditor v. Ballard*, 9 Bush, 572; *Eagle v. Smith*, 4 Houst. Del. 293.

and by him supplied. A contract is thereby formed, under which the person receiving them is compellable to pay. Even though the goods did not satisfy the terms of the order, if they are accepted and used the same result follows.¹

§ 334. *The Doctrine of this Chapter restated.*

The substance of this chapter is embraced in the simple proposition, that only when the wills of the parties, as shown on due outward manifestations, so unite in the same thing as exactly to coincide, does the law recognize a contract. In other chapters, the other elements of contract which must combine with this one, and the formalities required to attend upon and evidence this union of wills, are explained.

¹ *Dennis v. Stoughton*, 55 Vt. 371; *Downs v. Marsh*, 29 Conn. 409; *Bruce v. Pearson*, 3 Johns. 534.

CHAPTER XIII.

FORMALITIES AT THE MAKING OF WRITTEN CONTRACTS.

§ 335-339. Introduction.

340, 341. The Writing.

342-348. Signing.

349-361. Delivery.

362, 363. Incidental Questions.

364. Doctrine of Chapter restated.

§ 335. **Oral.** — Where the contract is oral, it, of course, will not necessarily be attended by any formalities; and the proof of it will be guided by rules of evidence, not for discussion here.

§ 336. **Under Seal.** — We have already considered of the seal,¹ and whatever else is special to this form of contract.² But what is common to it and other written contracts, together with some comparisons between the two as to their formalities, is within the scope of this chapter. Something of its interpretation will appear in the next chapter.

§ 337. **By Agents — Filling Blanks.** — These are for consideration in other connections.³

§ 338. **Elsewhere.** — A few questions remain which, though proper for this chapter, are reserved for other places equally or more appropriate.

§ 339. **How Chapter divided.** — We shall consider, I. The Writing; II. The Signing; III. The Delivery; IV. Incidental Questions.

I. *The Writing.*

§ 340. **On what Material.** — We have seen,⁴ that the law is particular to secure durability in the material on which are

¹ Ante, § 111.

² Ante, § 103-139.

³ Post, § 1165-1176.

⁴ Ante, § 110.

written sealed instruments. But since written contracts not under seal rank simply as parol ones,¹ and since the writing may, as we are about to see, be even in pencil, there is no reason to require the material to be paper or parchment; wood, for example, ought to suffice. But on this question the author is not able to refer to authorities.

§ 341. **Consists of what.** — In general, not saying that there may not be exceptions, the use of pen and ink, which is the ordinary method, is not indispensable to the production of what the law will deem a writing.² A lead-pencil will suffice³ even for the party's signature.⁴ And printed matter, when employed as a writing, is equally good as if done with a pen.⁵

II. *The Signing.*

§ 342. **Whether Necessary.** — The common and appropriate method of attesting a writing is to sign it. But, in general, a mere oral consent to what has been written out for a contract will, at the common law, suffice.⁶ There are, for example, numerous unsigned writings which, by reason of their being of legal validity, may be the subjects of forgery.⁷ And evidently among them are contracts.⁸ A familiar illustration is where one of the parties signs a writing, and another orally accepts it; both are bound.⁹ But under various statutes, a leading one of which is the Statute of Frauds, the contract to have effect must be signed by the party to be charged.

§ 343. **The Signature** — consists properly of the name of

¹ Ante, § 26, 158.

² 1 Bishop Crim. Proced. § 337; 2 Bishop Crim. Law, § 525-527.

³ Geary v. Physic, 7 D. & R. 653, 5 B. & C. 234; Reed v. Roark, 14 Texas, 329; McDowel v. Chambers, 1 Strob. Eq. 347; Lucas v. James, 7 Hare, 410, 419; Myers v. Vanderbilt, 3 Norris, Pa. 510.

⁴ Geary v. Physic, supra; Merritt v. Clason, 12 Johns. 102.

⁵ 2 Bishop Crim. Law, ut sup.

⁶ Farmer v. Gregory, 78 Ky. 475; Bacon v. Daniels, 37 Ohio State, 279;

Dutch v. Mead, 36 N. Y. Superior, 427; Leake Con. 184. See Tucker v. Bruce, 121 Mass. 400.

⁷ 2 Bishop Crim. Law, § 529 et seq.

⁸ And see Selby v. Selby, 3 Meriv. 2; Marshall v. Hann, 2 Harrison, 425; Grove v. Hodges, 5 Smith, Pa. 504; Paige v. Fullerton Woolen Co. 27 Vt. 485; Stearns v. Haven, 16 Vt. 87; Pooley v. Driver, 5 Ch. D. 458, 468, 469.

⁹ Brandon Manuf. Co. v. Morse, 48 Vt. 322; Reuss v. Picksley, Law Rep. 1 Ex. 342, 352.

the party duly attached to the writing. But the initials only, and especially the initials of the Christian name with the full surname, will suffice,¹ and so will the printed name, when employed as a signature.² Or if a person, to convey property, executes a deed of it in a name not his own, he is bound by such name, and the conveyance is effectual.³ Indeed anything which a man writes for his name is, under the common-law rules, a good signature; thus, the figures "1. 2. 8.," written on a bill of exchange, were held to constitute the writer's valid indorsement of the bill, being so intended.⁴ On this principle, the Christian name alone,⁵ or the English translation of a French name, as "Seam" for "Couture,"⁶ will suffice. This doctrine may require some qualification under a statute providing for a signature by the "name" of the party; when, doubtless, it must be some word or words by which he is commonly known.⁷

§ 344. **Place of Signature.** — The usual and proper place for the signature is at the foot of the matter which it attests. But, in strict law, it will suffice if, with the intent to constitute a signing, it is inserted in the writing at any other place.⁸

§ 345. **Manner of Signing.** — One signing a contract commonly writes his name with his own hand. Practically he ought always to do so if able. Still, if another writes it for him in his presence and at his request,⁹ or if he holds the top of the pen while the other writes it,¹⁰ or makes his mark to

¹ *Palmer v. Stephens*, 1 Denio, 471; see *Gardner v. Lucas*, 3 Ap. Cas. Sanborn v. Flagler, 9 Allen, 474, 478; 582.

² *The State v. Beck*, 81 Ind. 500.

³ 2 Bishop Crim. Law, § 527; *Commonwealth v. Ray*, 3 Gray, 441; *Schneider v. Norris*, 2 M. & S. 286.

⁴ *David v. Williamsburgh City Fire Ins. Co.* 83 N. Y. 265; *Janes v. Whitbread*, 11 C. B. 406; *Devendorf v. West Virginia Oil, &c. Co.* 17 W. Va. 135; *Elliot v. Davis*, 2 B. & P. 338. And see *Nixon v. Cobleigh*, 52 Ill. 387.

⁵ *Brown v. Butchers and Drovers Bank*, 6 Hill, N. Y. 443.

⁶ *Zann v. Haller*, 71 Ind. 136.

⁷ *Augur v. Couture*, 68 Maine, 427.

⁸ *Reg. v. Avery*, 18 Q. B. 576. And

⁹ *Knight v. Crockford*, 1 Esp. 190; *Lemayne v. Stanley*, 3 Lev. 1; *Saunders v. Hackney*, 10 Lea, 194.

¹⁰ *Jansen v. McCahill*, 22 Cal. 563; *Frost v. Deering*, 21 Maine, 156; *Pierce v. Hakes*, 11 Harris, Pa. 231; *Rex v. Longnor*, 1 Nev. & M. 576; *Bird v. Decker*, 64 Maine, 550; *Nye v. Lowry*, 82 Ind. 316, 320; *McMurtry v. Brown*, 6 Neb. 368; *Croy v. Busenbark*, 72 Ind. 48.

¹¹ *Helshaw v. Langley*, 11 Law J. N.S. Ch. 17.

his name which the other has written;¹ or, if he acknowledges the signature, however made, — whether honestly by a third person, or by forgery, or by the other party, — to be his own,² this is sufficient, even in specialties. But one's acknowledgment that he has signed a written instrument will not, it appears, constitute his signature, if there is a mere blank where it should stand.³ Impressing on the paper a stamp, whereon is engraved the ordinary signature, may suffice.⁴

§ 346. **Reading at Signing.** — One is never required to, and never should, execute any written instrument without first becoming fully acquainted with its contents.⁵ He should read it if able; or, if illiterate,⁶ have it read to him. And, when he has signed a written contract, the law *prima facie* presumes that he discharged this duty;⁷ therefore, whether in fact he did it, or chose to waive the privilege, his signature binds him.⁸ On the other hand, if the instrument is fraudulently read to him in terms different from its real ones; or if, not being read, its contents are fraudulently misrepresented, and he cannot himself read, or is otherwise without laches; he will not be holden by the signing.⁹ If the thing signed is

¹ *Baker v. Dening*, 8 A. & E. 94; *Zimmerman v. Sale*, 3 Rich. 76; *Foye v. Patch*, 132 Mass. 105; *Brown v. McClanahan*, 9 Baxter, 347.

² *Powell v. Blackett*, 1 Esp. 97; *Pequawket Bridge v. Mathes*, 7 N. H. 230; *McIntyre v. Park*, 11 Gray, 102; *Rhode v. Louthain*, 8 Blackf. 413; *Hill v. Scales*, 7 Yerg. 410; *Speckels v. Sax*, 1 E. D. Smith, 253; *Hawkins v. Chace*, 19 Pick. 502; *Wellington v. Jackson*, 121 Mass. 157, 159; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Haynes v. Haynes*, 33 Ohio State, 598; *Nye v. Lowry*, 82 Ind. 316, 320; *Clough v. Clough*, 73 Maine, 487.

³ *Jones v. Gurlie*, 61 Missis. 423.

⁴ *Bennett v. Brumfitt*, Law Rep. 3 C. P. 28.

⁵ *Weller's Appeal*, 7 Out. Pa. 594; *Hazard v. Griswold*, 21 Fed. Rep. 178.

⁶ *Manser's Case*, 2 Co. 3 a.

⁷ *Smyth v. Munroe*, 84 N. Y. 354, 361; *Campau v. Lafferty*, 50 Mich. 114; *Foye v. Patch*, 132 Mass. 105.

⁸ *Thoroughgood's Case*, 2 Co. 9 a; *Chapman v. Rose*, 56 N. Y. 137; *Rex v. Longnor*, 1 Nev. & M. 576; *School Committee v. Kesler*, 67 N. C. 443; *Wheeler & Wilson Manuf. Co. v. Long*, 8 Bradw. 463; *McCormack v. Molburg*, 43 Iowa, 561; *Susquehanna Mut. Fire Ins. Co. v. Swank*, 6 Out. Pa. 17; *Weller's Appeal*, *supra*; *Frits v. Frits*, 32 Ark. 327; *Maine Mut. & c. Ins. Co. v. Hodgkins*, 66 Maine, 109.

⁹ *Ib.*; *Sims v. Bice*, 67 Ill. 88; *Suffern v. Butler*, 3 C. E. Green, 220; *Green v. North Buffalo*, 6 Smith, Pa. 110; *Palmer v. Largent*, 5 Neb. 223; *Cole v. Williams*, 12 Neb. 440; *Trambly v. Ricard*, 130 Mass. 259, 261; *First National Bank v. Lierman*, 5 Neb. 247; *Griffith v. Short*, 14 Neb. 259; *Consols Ins. Assoc. v. Newall*, 3 Fost. & F. 130;

commercial paper, and it passes into the hands of an innocent third person, or is a mortgage on the security of which an innocent third person lends his money, or is any other instrument where the question arises simply between the defrauded signer and a defrauded third person, it does not seem quite clear how far this fact will increase the responsibility of the signer. But evidently he will sometimes be holden in these circumstances when he would not be in a litigation with the person practising the fraud.¹ On this class of questions, it has been well observed that "the authorities are conflicting."² In reason, to some of these cases the common-law doctrine must be applicable, that, as between two innocent persons, the law casts its protection over the one who is the more absolutely vigilant and without carelessness. If the writing was correctly read to a party having the legal capacity to contract, he cannot avoid the effect of his signature by showing his own misapprehension of its meaning.³

§ 347. *Intent in the Signing.* — The signing must be with intent to execute the instrument as a contract, else it will not bind the parties.⁴ Hence, —

§ 348. *All the Signatures.* — If, by parol stipulation,⁵ or, *a fortiori*, if by the writing itself,⁶ the contract was not to be deemed complete until other signatures should be added, it, without such addition, will not bind those who have signed it.⁷ But, if nothing of this appears, the parties signing will

Hummel v. Tyner, 70 Ind. 84; Webb v. Corbin, 78 Ind. 403. See post, § 645, 655.

¹ Roach v. Karr, 18 Kan. 529; Kellogg v. Curtis, 65 Maine, 59; Williams v. Stoll, 79 Ind. 80; Whitaker v. Miller, 83 Ill. 381. See post, § 646-649, 655.

² Kellogg v. Curtis, *supra*.

³ Jackson v. Lemle, 35 La. An. 855.

⁴ Grierson v. Mason, 60 N. Y. 394; Armstrong v. McGhee, Addison, 261; Morrill v. Tehama Consolidated Mill, &c. Co. 10 Nev. 125; Ramaley v. Le-land, 6 Rob. N. Y. 358.

⁵ Butler v. Smith, 35 Missis. 457; Keener v. Crago, 32 Smith, Pa. 166; Laird v. Campbell, 4 Out. Pa. 159;

Whitford v. Laidler, 94 N. Y. 145, 151, 152; Latch v. Wedlake, 11 A. & E. 959.

⁶ Waggeman v. Bracken, 52 Ill. 468; Sharp v. United States, 4 Watts, 21 (which compare with People v. Johr, 22 Mich. 461); Bean v. Parker, 17 Mass. 591, 605; Barber v. Burrows, 51 Cal. 404, 473; Chase v. Bailey, 49 Vt. 71; Woodin v. Durfee, 46 Mich. 424.

⁷ *Unimportant Omission.* — Where one signed a composition deed with creditors under the stipulation that it should not bind him unless all signed, the failure to execute it by a single creditor, whose claim was only two and a half dollars, was held not to avoid the deed; the con-

be holden, though even on the face of it the signatures of others were contemplated by the draughtsman.¹ To an extent not quite clear on the authorities, for they are discordant, a doctrine of the section before the last may be invoked here also, for the protection of innocent third persons who have incurred obligations in reliance on what appeared to be a duly executed contract.²

III. *The Delivery.*

§ 349. **Essential.** — Not only a specialty, as we have already seen,³ but a promissory note⁴ and every other written contract, must, to take effect, be delivered; and the delivery must be absolute, not as a mere escrow.⁵

§ 350. **Defined.** — The delivery of a written contract is any act whereby the party delivering it relinquishes his power over the writing, whether by passing it directly to the other party, or to any third person, or otherwise, with the expressed or implied intent that it shall operate as a contract; the other party, in fact, or in presumption of law, consenting thereto.⁶

dition being "substantially and legally complied with." *Fahey v. Clarke*, 80 Ky. 613. This is an instructive application of the maxim that the law does not concern itself about trifles. 1 Bishop *Crim. Law*, § 212.

¹ *Haskins v. Lombard*, 16 Maine, 140; *Webb v. Baird*, 27 Ind. 368; *Adams v. Bean*, 12 Mass. 137; *Cutter v. Whittemore*, 10 Mass. 442; *Hallett v. Collins*, 10 How. U. S. 174; *Scott v. Whipple*, 5 Greenl. 336; *Dillon v. Anderson*, 43 N. Y. 231; *The State v. Lewis*, 73 N. C. 138; *Los Angeles v. Mellus*, 59 Cal. 444.

² *Lytte v. Cozad*, 21 W. Va. 183; *Nash v. Fugate*, 32 Grat. 595; *Mowbray v. The State*, 88 Ind. 324, 330; *Sartwell v. Humphrey*, 136 Mass. 396; *Davis v. Gray*, 61 Texas, 506; *Hastings, &c. Railroad v. Miles*, 56 Iowa, 447; *Loving v. Dixon*, 56 Texas, 75; *Underhill v. Horwood*, 10 Ves. 209, 225.

³ *Ante*, § 113.

⁴ *Burson v. Huntington*, 21 Mich. 415; *Howe v. Ould*, 28 Grat. 1.

⁵ *Hopper v. Eiland*, 21 Ala. 714; *Carter v. McClintock*, 29 Misso. 464; *Lansing v. Gaine*, 2 Johns. 300; *Fay v. Richardson*, 7 Pick. 91; *McPherson v. Meek*, 30 Misso. 345; *Freeman v. Peay*, 23 Ark. 439; *Hawkes v. Pike*, 105 Mass. 560; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Heffron v. Flanigan*, 37 Mich. 274; *Johnson v. Brook*, 31 Missis. 17; *Jelks v. Barrett*, 52 Missis. 315; *White v. Core*, 20 W. Va. 272; *Rex v. Lambton*, 5 Price, 428; *Hyner v. Dickinson*, 32 Ark. 776.

⁶ The books seem absolutely bare of definitions of the delivery sufficiently precise to be of value. After examining a good deal of matter under this head, for the purpose of quoting definitions by others, I find nothing which would be of any essential service to the reader. As to the elements of this definition, see, among other places, *Thompson v.*

§ 351. **Elements and Reasons.** — This question most frequently arises where the contract is single, — that is, not in duplicate, — and it conveys or promises something from the delivering party to the other; as, for example, where it is a deed of land. Then there must be, either in fact or by presumption of law, a relinquishment of the writing by the grantor or promisor, his intent that it shall take effect, and its acceptance by the other party.¹ But so much of this comes or may come by operation of law from acts which outwardly fall short of what is thus stated, and from intents which the law presumes though in truth they may not exist, and in the cases the courts so often overlook important principles to which they would assent if their attention was called to them, that the question appears in the books somewhat confused, and the judicial utterances and adjudications seem not absolutely harmonious. Three principles ought constantly to be borne in mind: the one, that the law presumes an acceptance of whatever is beneficial to a party to whom it is conveyed;² another, that one who has in his possession anything belonging to a third person is under the duty to deliver it to the owner, whether such owner knows of the thing and its possession or not;³ the third, that, when the contract has taken

Easton, 31 Minn. 99; *Jelks v. Barrett*, 52 Missis. 315; *Campbell v. Thomas*, 42 Wis. 437; *Howe v. Ould*, 28 Grat. 1; *Vaughan v. Godman*, 94 Ind. 191; *Davenport v. Whisler*, 46 Iowa, 287; *Jamison v. Craven*, 4 Del. Ch. 311; *Brunn v. Schuett*, 59 Wis. 260; *Fisher v. Hall*, 41 N. Y. 416; *American & Co. v. Frank*, 62 Iowa, 202; *Thatcher v. St. Andrew's Church*, 37 Mich. 264.

¹ *Brown v. Brown*, 66 Maine, 316; *Jordan v. Davis*, 108 Ill. 336.

² *Stirling v. Vaughan*, 11 East, 619, 623; *Garnons v. Knight*, 5 B. & C. 671, 692; *Jones v. Swayze*, 13 Vroom, 279; *Elsberry v. Boykin*, 65 Ala. 336, 341; *Parker v. Parker*, 56 Iowa, 111, 113; *Palmer v. Palmer*, 62 Iowa, 204; *Church v. Gilman*, 15 Wend. 656; *Tibbals v. Jacobs*, 31 Conn. 428; *Mallory v. Stodder*, 6 Ala. 801.

³ The law is full of affirmations of this doctrine. Thus, if one finds goods which another has lost, and knows who the owner is, his duty is to restore them; and if, instead of doing this, he converts them to his own use, he commits larceny of them. 2 Bishop Crim. Law, § 882. Another illustration is from the doctrine of interpleader. If one has a thing of value in his possession, it being conceded that he is under obligation to deliver it to the true owner, then if two persons claim it under different titles, a bill of interpleader may be maintained in equity to settle the right. 2 Story Eq. § 806. This could not be if one might do as he chose about delivering up a thing to its owner. But it is needless to multiply proofs of so plain and familiar a doctrine.

effect, — as, for example, when a deed of land has operated to transfer the title, — the possession of the writing becomes unimportant.¹ Bearing these principles in mind, —

§ 352. **Possession — (To whom Deliver).** — The ordinary and proper possession of the contract, on and after its delivery, is with the party taking a benefit thereunder. But it is possible there should be a valid delivery while yet it does not apparently pass from the maker's possession; as, if the obligor in a bond, after signing and sealing it, holds it out in his hand and says to the obligee, "Here is your bond, what shall I do with it?" this is a delivery though it is not otherwise transferred to the latter. The reader will notice that the maker of the writing, in this case, relinquished all right to it, and put it in the power of the other party, who accepted its benefit, to take possession of it, and such party's right to the possession became absolute and irrevocable. After that, the delivery being accomplished, it was of no legal consequence what became of the writing. And it is believed that these are the true elements of a delivery.² A delivery to the

¹ *Austin v. Fendall*, 2 MacAr. 362; *Taliaferro v. Rolton*, 34 Ark. 503; *Hart v. Rust*, 46 Texas, 556; *Towery v. Henderson*, 60 Texas, 291; *Otis v. Spencer*, 102 Ill. 622.

² *Folly v. Vantuyt*, 4 Halst. 153; *Waddell v. Hewitt*, 1 Ire. Eq. 475; *Garrons v. Knight*, 5 B. & C. 671; *Farrar v. Bridges*, 5 Humph. 411; *Harris v. Saunders*, 2 Strob. Eq. 370; *Xenos v. Wickham*, Law Rep. 2 H. L. 296; *Scrugham v. Wood*, 15 Wend. 545; *Hall v. Palmer*, 3 Hare, 532, 8 Jur. 459; *Hope v. Harman*, 11 Jur. 1097, 1100; *Regan v. Howe*, 121 Mass. 424, 426; *Fisher v. Hall*, 41 N. Y. 416; *Gage v. Gage*, 36 Mich. 229; *McLure v. Colclough*, 17 Ala. 89; *Mallett v. Page*, 8 Ind. 364; *Stevens v. Hatch*, 6 Minn. 64; *Warren v. Swett*, 11 Fost. N. H. 332; *Floyd v. Taylor*, 12 Ire. 47; *Dayton v. Newman*, 7 Harris, Pa. 194; *Goodright v. Gregory*, Lofft, 339. There appear to be some differences of judicial opinion as to how far the writing, where a deliv-

ery is meant, must pass out of the control of the maker. That it must so pass seems to be affirmed in such cases as the following: *Johnson v. Brook*, 31 Missis. 17; *Jelks v. Barrett*, 52 Missis. 315; *Johnson v. Farley*, 45 N. H. 505; *Rivard v. Walker*, 39 Ill. 413; *Cook v. Brown*, 34 N. H. 460; *O'Neal v. Brown*, 67 Ga. 707; *Hatton v. Jones*, 78 Ind. 466. See *Canfield v. Ives*, 18 Pick. 253; *Rutledge v. Montgomery*, 30 Ga. 899. Still I cannot but think that these differences are reasonably reconciled by a comparison of the principles stated in the text. The writing, it seems to me, must go out of the control of the promisor or grantor, yet this need be only for the instant during which the delivery is taking effect. If the one in whose possession it is, tenders to the other the manual control of it, — so relinquishing for the instant all power over it, — and the other accepts it without taking it into his hands, this suffices, but nothing less will. *A fortiori*, where

party's agent is the same as to himself;¹ and, beyond this, within a principle stated in the last section, a delivery to any third person is likewise the same. Nor, since the party is by law presumed to accept it, will it be otherwise should he be ignorant of the fact.² *A fortiori*, the delivery of a trust deed to the *cestui que trust* will suffice.³

§ 353. **Acceptance by Third Person.** — In these cases of the delivery of the writing to a third person, there is authority for saying that, if he does not undertake to act as the agent of the party to whom it runs, and this party, by no word or sign, signifies his acceptance of it, there is no delivery.⁴ And in just reasoning, whether the third person accepts or declines the supposed agency, if the grantor or promisor does not relinquish all dominion over the writing and all power to reclaim it, such delivery is not effectual.⁵ But if the third person so far acts as to have the writing in his possession, the grantee or promisee being the owner of it by reason of the other party's having relinquished it, the law⁶ creates the promise⁷ to deliver it to the owner whether in form he consents or refuses, so that in this way the instrument becomes effectual. And this is believed to be the true doctrine.⁸

§ 354. **Delivery to Post-office.** — The putting of a deed or promissory note into the post-office, directed to the grantee or promisee, is a delivery if so intended.⁹

the former transfers to the latter the possession, under the mutual understanding that he has no further claim to it, his power over it is gone.

¹ *Everett v. Whitney*, 55 Iowa, 146; *Adams v. Ryan*, 61 Iowa, 733; *Henry v. Anderson*, 77 Ind. 361.

² *Garnons v. Knight*, 5 B. & C. 671; *Withers v. Jenkins*, 6 S. C. 122; *Palmer v. Palmer*, 62 Iowa, 204; *Myrover v. French*, 73 N. C. 609; *Jones v. Swayze*, 13 Vroom, 279; *Elsberry v. Boykin*, 65 Ala. 336; *Wheelwright v. Wheelwright*, 2 Mass. 447, 452; *Hatch v. Hatch*, 9 Mass. 307; *Regan v. Howe*, 121 Mass. 424; *Byington v. Moore*, 62 Iowa, 470; *Exton v. Scott*, 6 Sim. 31; *Lloyd v. Bennett*, 8 Car. & P. 124. See *Grugeon v. Gerrard*, 4 Y. & Col. Ex. 119.

³ *Crocker v. Lowenthal*, 83 Ill. 579.

⁴ *Johnson v. Farley*, 45 N. H. 505; *Curtis v. Gorman*, 19 Ill. 141; *Carey v. Dennis*, 13 Md. 1; *The State v. Oden*, 2 Har. & J. 108, note.

⁵ *Brown v. Brown*, 66 Maine, 316; *Williams v. Schatz*, 42 Ohio State, 47.

⁶ Ante, § 351.

⁷ Ante, § 204.

⁸ Consult, among other cases, *Brooks v. Marbury*, 11 Wheat. 78, 96-98; *Tompkins v. Wheeler*, 16 Pet. 106, 113; *Garnons v. Knight*, 5 B. & C. 671; *Grove v. Brien*, 8 How. U. S. 429; *Merrills v. Swift*, 18 Conn. 257; *Woodward v. Camp*, 22 Conn. 457, 461; *Pintard v. Bodle*, 20 Johns. 184.

⁹ *McKinney v. Rhoads*, 5 Watts, 343; *Mitchell v. Byrne*, 6 Rich. 171; *Kirk-*

§ 355. **Delivery to Register for Record.** — The delivery of a deed of lands to the register of deeds for record is, when viewed independently of its special circumstances, neither a delivery to the party in point of law, nor conclusive evidence of a prior delivery to him in fact. The authorities, as to its precise effect, are not quite harmonious; but, by some of them, and on principle, it is a delivery to the party if so intended, not otherwise; also, it is *prima facie* evidence of such prior delivery. It is not worth while here to distinguish the cases, but a reference to a few of them may be convenient.¹

§ 356. **Delivery as Escrow.** — The term “escrow” is commonly applied to deeds, but evidently it is equally applicable to other written contracts.² The instrument is called by this name when, after formal execution appears on its face, it is committed to a third person to be delivered and to take effect on the happening of a contingency.³ There appear to be no rules, other than as disclosed in the next section, limiting to any class the person competent to be custodian of an escrow. Even the attorney of the grantee is competent.⁴ And the grantee may be the agent of the grantor to convey the escrow to the third person.⁵ Further as to which, —

§ 357. **Specialty and Simple Contract, distinguished.** — The

man v. Bank of America, 2 Coldw. 397. And compare with ante, § 328.

¹ Barns v. Hatch, 3 N. H. 304; Hayes v. Davis, 18 N. H. 600; Derry Bank v. Webster, 44 N. H. 264, 268; Harman v. Oberdorfer, 33 Grat. 497; Walsh v. Vermont Mut. Fire Ins. Co. 54 Vt. 351; Connard v. Colgan, 55 Iowa, 538; Tharp v. Jarrell, 66 Ind. 52; Palmer v. Palmer, 62 Iowa, 204; Alexander v. Alexander, 71 Ala. 295, 297; Walton v. Burton, 107 Ill. 54; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267; Gould v. Day, 94 U. S. 405; Summers v. Darne, 31 Grat. 791. And see Lloyd v. Bennett, 8 Car. & P. 124; Foley v. Howard, 8 Iowa, 56; Ward v. Ward, 2 Hayw. 226; Burt v. Cassety, 12 Ala. 734; Stewart v. Weed, 11 Ind. 92.

² Ortmann v. Monroe Bank, 49 Mich.

56; Stewart v. Anderson, 59 Ind. 375; Kemp v. Walker, 16 Ohio, 118.

³ Worrall v. Munn, 1 Selden, 229; Badcock v. Steadman, 1 Root, 87.

⁴ Watkins v. Nash, Law Rep. 20 Eq. 262; Price v. Pittsburgh, &c. Railroad, 34 Ill. 13.

⁵ Brown v. Reynolds, 5 Sneed, Tenn. 639; Dietz v. Farish, 53 How. Pr. 217, 223; Gilbert v. North Amer. Fire Ins. Co. 23 Wend. 43. But this has been questioned as to the case where the grantee violates his trust. Brame v. Bingham, 26 N. Y. 483, 491, 492. In Dietz v. Farish, supra, Freedman, J. observed: “A deed may be deposited with the grantee, or handed to him, for any purpose other than as the deed of the grantor or as an effective instrument between the parties, without becoming at all operative as a deed.” p. 223.

delivery of a deed to the grantee in person gives it immediate force, even though accompanied by an oral stipulation that it shall not take effect until a specified contingency has transpired. Such stipulation, or condition, is simply void.¹ But it is otherwise of a written contract not under seal; a parol condition that its operation shall commence only on the transpiring of a future event will be good.² If at the first impression this distinction seems technical, a minuter examination will show it to be otherwise. In the case of a specialty, there could be no incorporation into it of a parol condition postponing its effect without destroying its character as a sealed instrument.³ But oral and written simple contracts being equally parol ones, the degree of this instrument is not reduced by the oral condition.

§ 358. **Second Delivery.** — When the condition on which the escrow was committed to the custodian is fulfilled, he should deliver it to the grantee. If, in violation of his trust, he delivers it without such fulfilment, or if in any other way it comes into the hands of the grantee surreptitiously, it passes nothing.⁴ There may be special cases, such as where the holder of the escrow is the grantor's agent under circumstances to justify the grantee in believing him authorized, wherein the grantor will be estopped, after delivery by the agent, to deny that it was authorized and effectual.⁵ If an escrow is fraudulently delivered, equity may interfere with its

¹ Co. Lit. 36'a; *Miller v. Fletcher*, 27 Grat. 403; *Foley v. Cowgill*, 5 Blackf. 18; *Holford v. Parker*, Hob. 246; *Morice v. Leigh*, 1 Dy. 34'b; *Badcock v. Steadman*, 1 Root, 87; *Jordan v. Pollock*, 14 Ga. 145; *Graves v. Tucker*, 10 Sm. & M. 9; *Worrall v. Munn*, 1 Selden, 229; *Braman v. Bingham*, 26 N. Y. 483; *Gibson v. Partee*, 2 Dev. & Bat. 530; *Hagood v. Harley*, 8 Rich. 325; *Williams v. Higgins*, 69 Ala. 517; *Wendlinger v. Smith*, 75 Va. 309; *McCann v. Atherton*, 106 Ill. 31; *Watkins v. Nash*, Law Rep. 20 Eq. 262.

² Ante, § 170; *Westman v. Krumweide*, 30 Minn. 313 (where it is said that the authorities to these two propo-

sitions of the text, many of which are cited, are not absolutely uniform); *Alexander v. Wilkes*, 11 Lea, 221 (but see *Stewart v. Anderson*, 59 Ind. 375); *Michels v. Olmstead*, 14 Fed. Rep. 219.

³ Ante, § 133.

⁴ *Cressinger v. Dessenburg*, 42 Mich. 580; *People v. Bostwick*, 32 N. Y. 445; *Robbins v. Magee*, 76 Ind. 381; *Skinner v. Baker*, 79 Ill. 496; *White v. Core*, 20 W. Va. 272; *Peter v. Wright*, 6 Ind. 183; *Russell v. Rowland*, 6 Wend. 666; *Everts v. Agnes*, 4 Wis. 343; *Ogden v. Ogden*, 4 Ohio State, 182.

⁵ *Simonton's Estate*, 4 Watts, 180; *Thomas v. Bleakie*, 136 Mass. 568, 571.

injunction against acting thereon, — a remedy concurrent with the law's, which holds the delivery void.¹

§ 359. **When takes Effect.** — Ordinarily, the delivery of the escrow to the grantee by the holder is essential to its taking effect as a deed, even where the condition has been fulfilled.² When, after fulfilment, it is delivered, its effect in general dates from such second delivery.³ Connected with this proposition there are some nice distinctions; as, for example, it is said that, if a deed is delivered to a third person “merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently,” not an escrow. Yet, even in this case, “it will not take effect as a deed until the second delivery; but, when thus delivered, it will take effect by relation from the first delivery.”⁴ Indeed, it is believed that there are various circumstances wherein the transpiring of the event, without any second delivery, will give operation to the writing; and it is immaterial whether we then call it an escrow or not.⁵ Passing over this kind of distinction, the “general rule does not apply,” to quote the language of Kent, “when justice requires a resort to fiction.”⁶ The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid

¹ Wyckoff v. Victor Sewing Machine Co. 43 Mich. 309.

² 4 Kent Com. 454; Bushel v. Pasmore, Holt, 213; Harkreader v. Clayton, 56 Missis. 383; Simpson v. McGlathery, 52 Missis. 723; Chastien v. Philips, 11 Ire. 255. I think that such is the law, and that it is sufficiently shown by the authorities just cited. But it is marvellous how speciously they might severally be reasoned away. In principle, the law must be so. The oral condition on which the deed is transferred to the third person cannot be held to pertain to the deed, for the reason just above stated. Ante, § 357. It is, therefore, a condition in the contract for delivery; namely, that the deed shall not be delivered to the grantee until a specified thing has transpired. It does not change

the law that a deed is without effect until delivery, applicable even where the grantee is entitled to have it delivered, and the delivery is refused.

³ Gratz v. Catlin, 2 Johns. 248; Bushel v. Pasmore, Holt, 213; Carter v. Turner, 5 Sneed, Tenn. 178; Williams's note to Holford v. Parker, Hob. 246; Hooper v. Ramsbottom, 6 Taunt. 12; Price v. Pittsburgh, &c. Railroad, 34 Ill. 13; Teneick v. Flagg, 5 Dutcher, 25; Russell v. Rowland, 6 Wend. 666; Keirsted v. Avery, 4 Paige, 9.

⁴ Foster v. Mansfield, 3 Met. 412, 415; Hathaway v. Payne, 34 N. Y. 92, 105.

⁵ Perryman's Case, 5 Co. 84a; Peck v. Goodwin, Kirby, 64.

⁶ Simpson v. McGlathery, 52 Missis. 723; Beekman v. Frost, 18 Johns. 544.

injury to the operation of the deed from events happening between the first and second delivery. Thus, if the grantor was a *feme sole* when she executed the deed, and she married before it ceased to be an escrow by the second delivery, the relation back to the time when she was sole is necessary to render the deed valid. But if the fiction be not required for any such purpose, it is not admitted, and the deed operates according to the truth of the case, from the second delivery."¹ Within this principle, —

§ 360. **Death.** — Since a deed cannot be delivered to a dead man,² if, while an escrow is lying in the hands of the third person the grantee dies, and then the condition is fulfilled, the law by its fiction holds the deed to have taken effect from its first and only possible delivery.³

§ 361. **Escrow deliverable on Grantor's Death.** — The foregoing distinctions may help us to determine the effect of a deed made to be delivered on the grantor's death: The cases appear a little in conflict or indistinct. If one, to make a gift of lands, writes and duly acknowledges a deed of them, keeping it in his possession but intending that the grantee shall find and record it on his death; it, though thus found and recorded, is ineffectual because not delivered in the lifetime of the grantor.⁴ But if the grantor commits the deed to a third person to be delivered by the latter on the transpiring of this event, intending it to be absolute, and reserving no right to reclaim or otherwise control it, the estate will pass, either by or independently of the second delivery,⁵ and as of the date of the first delivery.⁶ On the other hand, if the grantor, expressly or by implication, reserves in these circumstances the right to reclaim the deed, it will be of no effect.⁷

¹ 4 Kent Com. 454.

² Morgan v. Hazlehurst Lodge, 53 Missis. 665.

³ Perryman's Case, 5 Co. 84 a, 84 b; Coare v. Giblett, 4 East, 85, 94; Bostwick v. McEvoy, 62 Cal. 496; Ruggles v. Lawson, 13 Johns. 285. See Holt's Appeal, 2 Out. Pa. 257; Keirsted v. Avery, 4 Paige, 9.

⁴ Huey v. Huey, 65 Misso. 689; Pat-

erson v. Snell, 67 Maine, 559; Byars v. Spencer, 101 Ill. 429.

⁵ Latham v. Udell, 38 Mich. 238; Hatch v. Hatch, 9 Mass. 307.

⁶ Bail v. Foreman, 37 Ohio State, 132.

⁷ Brown v. Brown, 66 Maine, 316; Williams v. Schatz, 42 Ohio State, 47; Walter v. Ford, 74 Misso. 195. And see Campbell v. Thomas, 42 Wis. 437; Otto v. Doty, 61 Iowa, 23; Byars v. Spencer,

IV. *Incidental Questions.*

§ 362. **Attesting Witnesses.** — In some of our States, certain deeds require, either for their validity or for some collateral purpose, to be attested by witnesses subscribing their names thereto.¹ And as a means of preserving the evidence, this is commonly practised, not only in deeds but in various other written contracts. Yet, in the absence of a statute, this is not indispensable to the legal validity of the instrument.²

§ 363. **Acknowledgment.** — Under our registration laws, the grantor's acknowledgment of his deed, given before a magistrate, is commonly a prerequisite to its being recorded. And under some of them, it may have other effects. Otherwise it is immaterial.³ But this sort of regulation varies in our States, so we need not further pursue the inquiry here.

§ 364. *The Doctrine of this Chapter restated.*

The law, to promote justice and carry out the purposes of contracting parties, has established certain formalities to

101 Ill. 429. Contra, *Morse v. Slason*, 13 Vt. 296. Substantially in accord with the propositions of the text is the summary, by Boynton, C. J. in *Ball v. Foreman*, supra, at p. 139, 140. I copy it, with the authorities cited by him. "The following propositions relative to the delivery of deeds seem to be well established, both upon principle and authority. 1st. Where the grantor places in the hands of a depository, a deed to be delivered to the grantee upon the death of the grantor, reserving the right or power to recall the deed at any time before his death, there is no delivery, and the deed passes no title to the premises therein described. In such case the depository is the agent of the grantor, and holds the deed subject to his direction and control. *Shirley v. Ayres*, 14 Ohio, 307; *Cook v. Brown*, 34 N. H. 460; *Prutsman v. Baker*, 30 Wis. 644. 2d. But where the grantor delivers the writ-

ing as his deed to the depository, to be delivered to the grantee at his death, or on some future event, it is the grantor's deed presently, and the depository becomes a trustee of the grantee. *Crooks v. Crooks*, 34 Ohio State, 610; *Mitchell v. Ryan*, 3 Ohio State, 377; *Wheelwright v. Wheelwright*, 2 Mass. 447, 452; *Foster v. Mansfield*, 3 Met. 412; *Mather v. Corliss*, 103 Mass. 568; *Hathaway v. Payne*, 34 N. Y. 92. In such case the deed passes a present interest to be enjoyed in the future. *Ruggles v. Lawson*, 13 Johns. 285, 286; *Tooley v. Dibble*, 2 Hill, N. Y. 641."

¹ *French v. French*, 3 N. H. 234; *Genter v. Morrison*, 31 Barb. 155. See, for a historical view of this subject, 2 Bl. Com. 307.

² *Morton v. Leland*, 27 Minn. 35; *Dole v. Thurlow*, 12 Met. 157, 166; *Quinney v. Denney*, 18 Wis. 485.

³ *Washington v. Dunn*, 27 Grat. 608.

attend the making of written contracts. They are only to a small degree technical. In the absence of any statute commanding otherwise, neither a simple contract in writing nor a specialty need be signed, if only the assent of the party in the one case, or his seal in the other, is given. But of some contracts our statutes have made signing necessary. A mark, the recognition of the signature when written by another, the writing of the mere initials of the name, — with pen and ink, a pencil, printers' types, or anything else which will leave a legible impression, — will constitute a signing. If no fraud is practised, the written contract will be valid though not read; but it must be delivered. The rules for the delivery are constructed in recognition of whatever is within the essence and spirit of a delivery, and they do not enforce outward form and ceremony. The reader will be more benefited by a reperusal of them in full than he would be by any condensed repetition here.

CHAPTER XIV.

THE INTERPRETATION OF THE CONTRACT AS TO ITS
MEANING.

§ 365-368. Introduction.

369-378. What in Connection with Written Words.

379-418. Leading Rules of Interpretation.

419-423. Precedence of the Rules.

424-427. Further Explanations.

428. Doctrine of Chapter restated.

§ 365. **Meaning — Effect.** — The interpretation of a contract is the ascertaining, not only of its verbal meaning, but also of its legal effect. The former is for elucidation in this chapter, the latter in the next.

§ 366. **Difficulties of Subject.** — The construction of contracts, like that of statutes with which it is nearly identical,¹ is a subject both easy and difficult of comprehension. Its difficulties are threefold: first, in bringing the mind down, from its ordinary upward straining after something great, to the simple common-sense of the thing; secondly, in applying the nearly axiomatic rules of interpretation in such way as to give each its proper force, and preserve the due order of precedence among the rules; thirdly, in appreciating the fact that the books do impart real light on the subject, and that it is the practitioner's duty to study and consult them. The rules themselves are easily enough ascertained; and, like other good tools, they do excellent work when well handled, and mischief in the hands of the bungler.

§ 367. **Importance.** — In importance, this entire topic, including the interpretation of statutes and all other legal

¹ Bishop Written Laws, § 4.

writings, is second to no other in the law. As said by Mr. Preston, speaking of the exposition of deeds, a knowledge of it is “indispensable,” — “as essential as is the knowledge of the alphabet, and of the rules of grammar, to those persons who would become proficient in any language.”¹ This is among the reasons which induced the author to place this chapter so early in the volume.

§ 368. **How Chapter divided.** — We shall inquire, I. What is to be regarded in Connection with the Written Words; II. What are the Leading Rules of Interpretation; III. Precedence of the Rules; concluding with, IV. Further Explanations.

I. *What is to be regarded in Connection with the Written Words.*

§ 369. **Fragmentary Nature of the Authorities.** — The subject of this sub-title calls once more to mind the fact, never to be lost sight of in the investigation of legal questions, that to a considerable extent our law authorities present the respective doctrines in fragments, instead of completed entities.² It could not be otherwise; for, from the nature of judicial functions, our courts must, and therefore do, constantly limit their investigations by the limited facts of the particular case under decision. So their horizon of vision is always contracted, and it is never precisely the same in two cases. Hence, of necessity, their several enunciations are but fragments of the real, rounded doctrine, which often no court has occasion to propound. To collect these fragments, and mould them into the pillared law which bestuds the pathway of the finished jurist, is the proper work of the commentator. In the spirit of this duty, if not in its complete fulfilment, let us endeavor to discern how, on a wider view than the books generally give us, yet not departing from their teachings, the law of this sub-title stands.

§ 370. **Governing Principles.** — Persons contracting together

¹ In his edition of Shep. Touch. 88.

² Ante, § 184, note, 217, note.

have around them the entire world and all its wisdom and folly. But evidently they do not know all; and, if one is cognizant and another ignorant of the same thing, a principle already stated,¹ whereby, for the promotion of fair dealing, the former is estopped to set up what lies in his own mind unknown to the other, will prevent any knowledge which is not actually or presumptively mutual from being taken into the account. The parties, therefore, speak in their contract from the fountain of mutual knowledge;² and, if we would precisely interpret their words, we must put ourselves exactly in their position, and know just what they mutually knew, with neither addition nor abatement.³ But fully to do this is impossible. The interpreter can accomplish, in this direction, only what, within the rules of evidence, is practicable, and there he must stop. The most conspicuous of all the limits which the law of evidence will impose upon him is, that he shall not undertake to inform himself of anything not legally adapted to illumine the question of the meaning.⁴ In fact, the author is not quite prepared to say that this is not the only limit. Hence, —

§ 371. *Defined.* — The doctrine of this sub-title is, that the interpreter of a contract shall look, not only into the words, but in connection with them into all such of the surrounding facts as, without violating any rule of law, and being known to both parties, tend to modify the interpretation. To take now up the subject more nearly in the ordinary language of the books, —

§ 372. *Surroundings.* — Though the writing cannot be orally contradicted,⁵ except when it is to be reformed in equity as not expressing what both the parties intended, or under equitable rules is to be treated as thus reformed,⁶ yet the parties' surroundings, their relations to each other, and the like, may

¹ Ante, § 317.

² *Haddock v. Woods*, 46 Iowa, 433.

³ *Rawson v. Beach*, 13 R. I. 151, 152.

⁴ 1 Greenl. Ev. § 52; *Stephen Ev.* May's ed. 37.

⁵ Ante, § 169; *Glendale Woolen Co. v. Protection Ins. Co.* 21 Conn. 19;

Griswold v. Scott, 13 Ga. 210; *Clark v. Lillie*, 39 Vt. 405.

⁶ 1 Greenl. Ev. § 296 a; *Murray v. Dake*, 46 Cal. 644; *Popplein v. Foley*, 61 Md. 381; *Kelley v. McKinney*, 5 Lea, 164; post, § 687.

be shown as helps to the understanding of their written stipulations.¹ And within this rule are, not only parol facts, but likewise contemporaneous writings which do not constitute parts² of the contract.³ But our books do not always express the doctrine quite so broadly; and, in truth, —

§ 373. **Limitations of Surroundings.** — The doctrine is limited and restrained, as just intimated,⁴ within comparatively narrow bounds. Fully to draw the lines of distinction between the admissible and inadmissible would conduct us too far into the law of evidence, which is not for the present work. Some illustrations are, —

§ 374. **Names of Persons — (Latent Ambiguity).** — The surroundings may be looked into to discover persons bearing the names written in the contract. Then, should two of one of those names be found, the oral evidence may be carried to the further point of showing which of the two was meant.⁵ In other words, if, bringing by oral proofs the surroundings before us, we find two persons of the one name, there is disclosed to us what is called a latent ambiguity; that is, an ambiguity arising out of the evidence where, on the face of the writing, all is plain. Thereupon the rule is, that such ambiguity, being created by parol, may be explained by parol.⁶ But, —

¹ 1 Greenl. Ev. § 297; Add. Con. 7th London ed. 164; *Maryland v. Railroad*, 22 Wal. 105; *Dodge v. Gardiner*, 31 N. Y. 239; *Western N. Y. Life Ins. Co. v. Clinton*, 66 N. Y. 326, 331; *Clark v. New York Life Ins. &c. Co.* 64 N. Y. 33, 37; *Pollard v. Maddox*, 28 Ala. 321; *Sumner v. Williams*, 8 Mass. 162, 214; *Price v. Evans*, 26 Misso. 30; *Codman v. Johnson*, 104 Mass. 491; *Masters v. Freeman*, 17 Ohio State, 323; *Hutchins v. Hebbard*, 34 N. Y. 24; *Webster v. Blount*, 39 Misso. 500; *Salisbury v. Andrews*, 19 Pick. 250, 253; *Knight v. New England Worsted Co.* 2 Cush. 271; *Farmers Loan, &c. Co. v. Commercial Bank*, 15 Wis. 424; *Williamson v. McClure*, 1 Wright, Pa. 402; *Tracy v. Chicago*, 24 Ill. 500; *Aldrich v. Aldrich*, 135 Mass. 153; *Rockwell v. Humphrey*, 57 Wis. 410; *Lacy v. Green*,

3 *Norris*, Pa. 514; *Crawford v. Elliott*, 78 Misso. 497; *Pratt v. Canton Cotton Co.* 51 Misso. 470; *Mobile, &c. Railway v. Jurey*, 111 U. S. 584, 592; *Knick v. Knick*, 75 Va. 12, 19; *Stewart v. Smith*, 3 Baxter, 231; *Carmichael v. White*, 11 Heisk. 262; *Spaulding v. Coon*, 50 Mich. 622.

² Post, § 382.

³ *Wilson v. Randall*, 67 N. Y. 338; *Marietta Savings Bank v. Janes*, 66 Ga. 286.

⁴ Ante, § 370.

⁵ *The State v. Weare*, 38 N. H. 314; *Simpson v. Dix*, 131 Mass. 179, 184.

⁶ Post, § 390; *Bruff v. Conybeare*, 13 C. B. n. s. 263, 9 Jur. n. s. 78, 79; *Bank of United States v. Dunn*, 6 Pet. 51, 58; *Cubberly v. Cubberly*, 7 Halst. 308; *Steadman v. Taylor*, 77 N. C. 134.

§ 375. **Patent Ambiguity.** — Since the general doctrine forbids the modification of written contracts by oral proofs,¹ there is no very clear ground for excepting the parts which are obscure. So it has become a sort of rule, that an ambiguity in the writing itself, termed a patent ambiguity, cannot be explained by parol. Yet this does not exclude all evidence of the surroundings; and in various circumstances the ambiguity, though patent, may be removed by the oral elucidations.² Again, —

§ 376. **Subject of Contract.** — Parol evidence is always admissible to identify the subject of a contract; of course, in subordination to its terms.³ Thus, on a deed of a mill and its appurtenances, the appurtenances may be pointed out orally;⁴ or, if one bargains with another to pay him so much for his “farm,” the farm may be located by parol;⁵ or, to buy a certain number of hogs, the animals may in this manner be identified.⁶ And so may all uncertainties in the descriptions of things, if the facts allow, be explained by parol.⁷

§ 377. **Meanings of Words and Terms.** — If the contract is in our own language, the meanings of its words are judicially known to the court;⁸ but, if in a foreign language, they are to be proved.⁹ The common abbreviations are English, and

¹ Ante, § 372.

² *Fish v. Hubbard*, 21 Wend. 651, 659; *Richmond Trading, &c. Co. v. Farguar*, 8 Blackf. 89; *Haven v. Brown*, 7 Greenl. 421; *Crawford v. Jarrett*, 2 Leigh, 630; *Locke v. Sioux City, &c. Railway*, 46 Iowa, 109; *Merriam v. Pine City Lumber Co.* 23 Minn. 314; *Rockwell v. Humphrey*, 57 Wis. 410; *Nilson v. Morse*, 52 Wis. 240; *Hueske v. Broussard*, 55 Texas, 201.

³ *Hildebrand v. Fogle*, 20 Ohio, 147; *Coleman v. Manhattan Imp. Co.* 94 N. Y. 229; *Almgren v. Dutilh*, 1 Selden, 28, 33; *Bennett v. Pierce*, 28 Conn. 315; *McGregor v. Brown*, 5 Pick. 170, 174; *Pharoah v. Lush*, 2 Fost. & F. 721; *Howard v. Pepper*, 136 Mass. 28.

⁴ *Scheible v. Slagle*, 89 Ind. 323; *Baker v. Bessey*, 73 Maine, 472.

⁵ *Brinkerhoff v. Olp*, 35 Barb. 27. To the like effect, *Baucum v. George*, 65 Ala. 259; *Pettigrew v. Dobbelaar*, 63 Cal. 396; *Chicago Dock, &c. Co. v. Kinzie*, 93 Ill. 415.

⁶ *Pope v. Machias, &c. Co.* 52 Maine, 535. To the like effect, *Norris v. Spofford*, 127 Mass. 85.

⁷ *Cooper v. White*, 30 Ark. 513; *Messer v. Oestreich*, 52 Wis. 684; *Hamm v. San Francisco*, 17 Fed. Rep. 119.

⁸ 1 Greenl. Ev. § 5; *Bishop Stat. Crimes*, § 1006 a.

⁹ *Bishop Dir. & F.* § 619, note; *Grell v. Levy*, 16 C. B. n. s. 73, 10 Jur. n. s. 210; *Di Sora v. Phillipps*, 10 H. L. Cas. 624.

so taken cognizance of without proof;¹ as, for example, “admr.” for administrator.² In this way, “C. O. D.,” once unintelligible to most people, has come so fully into use that its signification is now known judicially.³ And words and abbreviations are constantly being added to the language, and the courts thus recognize their definitions as fast as their use becomes common.⁴ But while they are employed only in a particular locality, or by a particular class of persons, their significations in a contract must, to be known by the judge and jury, be proved; as, that “f. o. b.” means free on board.⁵ In this way, such words as “put” and “call,”⁶ “on margin,”⁷ “cuts,”⁸ “stubble,”⁹ “current funds,”¹⁰ and “spitting of blood,”¹¹ have been explained. The meaning of an ancient charter in Latin is derivable from evidence of ancient use and practice,¹² and all old charters may be interpreted in the light of long usage under them.¹³ Again, —

§ 378. **Law and Usage.** — Both the court and the parties are conclusively presumed to know the law,¹⁴ but a local or limited custom or usage must be proved.¹⁵

II. *The Leading Rules of Interpretation.*

§ 379. **Need for Interpretation.** — There should be interpretation only where it is needed; that is, only where, without it, the meaning or effect of the contract would be in doubt.¹⁶ Assuming such need, —

¹ *Stephen v. The State*, 11 Ga. 225; *Weaver v. McElhenon*, 13 Misso. 89. But see *Ellis v. Park*, 8 Texas, 205; *Russell v. Martin*, 15 Texas, 238.

² *Moseley v. Mastin*, 37 Ala. 216.

³ *United States Express Co. v. Keef*, 59 Ind. 263.

⁴ 1 Bishop Crim. Proc. § 347.

⁵ *Silberman v. Clark*, 96 N. Y. 522.

⁶ *Pixley v. Boynton*, 79 Ill. 351.

⁷ *Hatch v. Douglas*, 48 Conn. 116.

⁸ *Houghton v. Watertown Fire Ins. Co.* 131 Mass. 300.

⁹ *Callahan v. Stanley*, 57 Cal. 476.

¹⁰ *Haddock v. Woods*, 46 Iowa, 433.

¹¹ *Singleton v. St. Louis Mut. Ins. Co.* 66 Misso. 63.

¹² *Attorney-General v. Boston*, 9 Jur. 838.

¹³ *Newcastle Pilots v. Bradley*, 2 Ellis & B. 428, note, 16 Jur. 494; *Blankley v. Winstanley*, 3 T. R. 279; *Gape v. Handley*, 3 T. R. 288, note; *Rex v. Osbourne*, 4 East, 327; *Rex v. Varlo*, Cowp. 248.

¹⁴ *Hart v. United States*, 95 U. S. 316.

¹⁵ *Page v. Cole*, 120 Mass. 37; *Jones v. Hoey*, 128 Mass. 585; *Mand v. Trail*, 92 Ind. 521; *Branch v. Palmer*, 65 Ga. 210.

¹⁶ *Vattel Law of Nations*, b. 2, § 263;

§ 380. **Intent of Parties.** — The rule most conspicuous and wide-reaching of all is, that a written contract shall be so interpreted as, if possible, to carry out what the parties meant.¹ This is likewise the foremost rule for the interpretation of statutes; namely, so to render them as to give effect to the legislative intent.² At the same time, —

§ 381. **Words of Contract.** — The parties are bound by the terms which they have voluntarily employed.³ And since they cannot plead ignorance of the law,⁴ neither likewise can they, of the effect of their language.⁵ Within this rule, a stipulation for a thing will not be satisfied by something else presumably as good; as, if a railroad, by its ticket, promises a ride from Portland to Boston, it cannot be compelled to furnish one from Boston to Portland.⁶ And if an insurance policy declares that certain answers shall constitute a part of the contract and be a warranty, the insured person cannot avoid their effect by showing their immateriality.⁷

§ 382. **Entire Writing — Other Writings.** — The whole of the written instrument, whether on one piece of paper or on detached pieces constituting one contract, and all writings on the same subject, whether together forming one agreement or

Bishop Written Laws, § 72; Noyes v. Nichols, 28 Vt. 159; Means v. Presbyterian Church, 3 Watts & S. 303; McConnell v. New Orleans, 35 La. An. 273; Walker v. Tucker, 70 Ill. 527.

¹ Collins v. Lavelle, 44 Vt. 230; Browning v. Wright, 2 B. & P. 13, 26; Hunter v. Miller, 6 B. Monr. 612; Wolfe v. Scarborough, 2 Ohio State, 361; Higgins v. Wasgatt, 34 Maine, 305; Wilkinson v. Tranmarr, Willes, 682, 2 Wils. 75; Stadhard v. Lee, 3 B. & S. 364, 9 Jur. n. s. 908; Pomery v. Partington, 3 T. R. 665; Smith v. Jersey, 3 Bligh, 290, 2 Brod. & B. 473. "If a deed can operate two ways, one consistent with the intent and the other repugnant to it, courts will be ever astute so to construe it as to give effect to the intent." Dallas, C. J. in Solly v. Forbes, 2 Brod. & B. 38, 48, 49. "I do exceedingly commend the judges that

are curious and almost subtle, *astuti* (which is the word used in the proverbs of Solomon in a good sense), to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury." Hobart, J. in Clanrickard v. Sidney, Hob. 273, 277 b. This doctrine is confirmed in Crossing v. Scudamore, 1 Vent. 137, 141.

² Bishop Written Laws, § 70, 75, 76.

³ Ante, § 317, 370; Strohecker v. Farmers Bank, 6 Barr, 41; Holmes v. Hall, 8 Mich. 66; Furbush v. Goodwin, 5 Fost. N. H. 425.

⁴ Ante, § 378; post, § 462.

⁵ Boner v. Mahle, 3 La. An. 600; Watrous v. McKie, 54 Texas, 65.

⁶ Keeley v. Boston, &c. Railroad, 67 Maine, 163. To the like effect, Howard v. Chicago, &c. Railroad, 61 Missis. 194.

⁷ Thomas v. Fame Ins. Co. 108 Ill. 91.

more than one, if made simultaneously or sometimes when even executed on different days, should be looked at in interpreting each particular part.¹ Plans, maps, specifications, schedules, and other like things referred to in the principal writing should be considered as constituting with it a whole.²

§ 383. **Inaccuracies.** — No inaccuracy of language, whether from false grammar, from employing a word in a wrong meaning, omitting a word or even a clause plainly meant to be inserted, inserting a word not meant, using the wrong word, or otherwise, will be permitted to defeat the intent, when it can thus be distinctly ascertained.³ For example, to give effect to the evident meaning, “or” may be read as “and;”⁴ “quarterly” as “annually;”⁵ and “party of the first part” as “party of the second part.”⁶ So a bond beginning “I hereby bind myself,” and signed by more persons than one, is obligatory on all.⁷ And in England a bill for “twenty-

¹ *Collins v. Lavelle*, 44 Vt. 230; *Northumberland v. Errington*, 5 T. R. 522, 526; *Hesse v. Stevenson*, 3 B. & P. 565; *Wildman v. Taylor*, 4 Ben. 42; *New Hampshire Bank v. Willard*, 10 N. H. 210; *Thomas v. Austin*, 4 Barb. 265; *Holmes v. Martin*, 10 Ga. 503; *Stover v. Metzgar*, 1 Watts & S. 269; *Whitehurst v. Boyd*, 8 Ala. 375; *Casey v. Holmes*, 10 Ala. 776; *Stacey v. Randall*, 17 Ill. 467; *Makepeace v. Harvard College*, 10 Pick. 298, 302; *Hunt v. Frost*, 4 Cush. 54; *Craig v. Wells*, 1 Kernan, 315; *Berry v. Wisdom*, 3 Ohio State, 241; *Dibol v. Minott*, 9 Iowa, 403; *Berryman v. Hewit*, 6 J. J. Mar. 462; *Payler v. Homersham*, 4 M. & S. 423, 426; *Morss v. Salisbury*, 48 N. Y. 636; *Byrd v. Ludlow*, 77 Va. 483; *Wood v. Bibbins*, 58 Ind. 392; *Hill v. Parker*, 10 Bradw. 323; *Cooper v. Shaver*, 5 Out. Pa. 547. See ante, § 165.

² *Walker v. Boynton*, 120 Mass. 349; *Erskine v. Moulton*, 66 Maine, 276; *Snow v. Schomacker Manuf. Co.* 69 Ala. 111; *Weeks v. Maillardet*, 14 East, 568; *Reed v. Lammel*, 28 Minn. 306; *Cummings v. Browne*, 61 Iowa, 385; *Sexton*

v. Chicago, 107 Ill. 323; *Jenkins v. Harrison*, 66 Ala. 345.

³ *Wilson v. Wilson*, 5 H. L. Cas. 40, 66; *Kelley v. Upton*, 5 Duer, 336; *Thayer v. Lapham*, 13 Allen, 26; *Oliver v. Brown*, 3 Bur. 1626, 1634, 1635; *Leach v. Micklem*, 6 East, 486; *Stockton v. Turner*, 7 J. J. Mar. 192; *De Soto v. Dickson*, 34 Missis. 150; *Kincannon v. Carroll*, 9 Yerg. 11; *Pannell v. Mill*, 3 C. B. 625, 638; *Salmon Falls Manuf. Co. v. Portsmouth Co.* 46 N. H. 249; *Fowle v. Bigelow*, 10 Mass. 379, 383; *Saunders v. Hanes*, 44 N. Y. 353; *Caldwell v. Layton*, 44 Misso. 220; *Atlanta and West Point Railroad v. Speer*, 32 Ga. 550; *Morey v. Homan*, 10 Vt. 565; *Bennehan v. Webb*, 6 Ire. 57; *Iredell v. Barbee*, 9 Ire. 250; *Whitsett v. Womack*, 8 Ala. 466; *Hogans v. Caruth*, 19 Fla. 84, 90.

⁴ *Elliott v. Ellis*, 14 Philad. 188; *Bishop Written Laws*, § 243.

⁵ *Fowler v. Woodward*, 26 Minn. 347.

⁶ *Huyler v. Atwood*, 11 C. E. Green, 504.

⁷ *Knisely v. Shenberger*, 7 Watts, 193.

five, seventeen shillings, and three pence" is for twenty-five pounds, &c. "It must mean pounds, it cannot mean anything else."¹ Yet, excepting these and other like cases, the rule is, that —

§ 384. **Effect given every Clause and Word.** — Every clause and even every word should, when possible, have assigned to it some meaning. It is not allowable to presume, or to concede when avoidable, that the parties in a solemn transaction have employed language idly.² And this applies the same to the writing as a whole as to its particular expressions; so that, for illustration, if it may operate as a deed, yet if for want of due attestation it cannot take effect as a will, it will be held to be the former.³ Still, —

§ 385. **Surplusage.** — The necessities of the interpretation may compel the rejection of a word or phrase. Thus, if an insurance policy on dry goods and groceries, not covering the building, declares that the keeping of gunpowder "upon or in the premises insured" shall render the policy void, this provision will be rejected in the interpretation; for there is nothing to which it can be applied.⁴ And a false description in a deed will be thus rejected, if there is other matter sufficiently showing the intent.⁵ So likewise may be any meaningless word,⁶ and so even a seal.⁷ If a conveyance of real and personal property is invalid as to the realty, it may still take effect as to the personalty.⁸ Among the obscurities which require this sort of treatment, is —

¹ *Phipps v. Tanner*, 5 Car. & P. 488, by Tindal, C. J. To the like effect, *Harman v. Howe*, 27 Grat. 676; *Coles v. Hulme*, 8 B. & C. 568; *Butler v. Bohn*, 31 Minn. 325.

² *Shelley's Case*, 1 Co. 93 b, 95 b; *Heywood v. Heywood*, 42 Maine, 229; *Baron v. Placide*, 7 La. An. 229; *Metcalf v. Taylor*, 36 Maine, 28; *Hydeville Co. v. Eagle Railroad and Slate Co.* 44 Vt. 395; *Churchill v. Reamer*, 8 Bush, 256, 260; *Randel v. Chesapeake and Delaware Canal*, 1 Harring. Del. 151; *Bush v. Watkins*, 14 Beav. 425; *Corbin v. Healy*, 20 Pick. 514; *Herrick v. Hopkins*, 23 Maine, 217; *Stratford v.*

Bosworth, 2 Ves. & B. 341; *Fowle v. Kerchner*, 87 N. C. 49.

³ *Dismukes v. Parrott*, 56 Ga. 513.

⁴ *Mosley v. Vermont Mut. Fire Ins. Co.* 55 Vt. 142.

⁵ *Jackson v. Hodges*, 2 Tenn. Ch. 276; *Getchell v. Whittemore*, 72 Maine, 393; *Harris v. Hull*, 70 Ga. 831; *Bradshaw v. Bradbury*, 64 Misso. 334.

⁶ *Decorah v. Kesselmeier*, 45 Iowa, 166.

⁷ *Thomas v. Joslin*, 30 Minn. 388.

⁸ *Thompson v. Marshall*, 36 Ala. 504. And see *Northern Pacific Railroad v. United States*, 15 Ct. of Cl. 428.

§ 386. **Repugnancy.** — After interpretation has exhausted itself in harmonizing the several clauses and words, if there is a residue which cannot be reconciled, the repugnancy must be got rid of by rejecting what will free the writing from it.¹ The difficulty is to determine what to reject and what to retain. The author believes it to be the true method to regard but lightly the technical rules on this question; and, feeling after the intent of the parties,² to discard on the one hand, and retain on the other, what in the result will best give effect to such intent.³ Still, there are some minor rules, of unequal value, which, applied in subordination to the superior one of following the intent, may be of service. To illustrate, —

§ 387. **Proviso.** — If the main body of the writing is followed by a proviso wholly repugnant thereto, it must necessarily be rejected, because otherwise the entire contract will be rendered null.⁴ But where it can be construed to qualify the main provisions, so that all may stand together, it will be retained.⁵ Likewise, —

§ 388. **Inconsistent Power — Habendum.** — As a married woman under the common-law disabilities can alienate her lands only in concurrence with her husband, if, in a devise or deed of lands to her, there is embodied a power to dispose of them independently of him, it will be void, because repugnant to the gift or grant. It could not stand without overthrowing all.⁶ So a conveyance in fee cannot be cut down to a life estate by the *habendum* of the deed; for it would be incon-

¹ *Lambe v. Reaston*, 5 Taunt. 207; *Cooley v. Warren*, 53 Misso. 166; *Shewalter v. Pirner*, 55 Misso. 218; *Wells v. Wright*, 2 Mod. 285; *Phillips v. Porter*, 3 Pike, 18; *Eldridge v. See Yup Co.* 17 Cal. 44; *Gibson v. Bogy*, 28 Misso. 478; *Emerson v. White*, 9 Fost. N. H. 482.

² Ante, § 380.

³ *Driscoll v. Green*, 59 N. H. 101; *Case v. Dwire*, 60 Iowa, 442; *Smith v. Flanders*, 129 Mass. 322; *Findley v. Armstrong*, 23 W. Va. 113; *Erskine v. Moulton*, 66 Maine, 276; *Gallaher v. District of Columbia*, 19 Ct. of Cl. 564.

⁴ *Bac. Abr. Grant*, I. 1; *Stewkley's Case*, Sir F. Moore, 880; *Furnivall v. Coombes*, 5 Man. & G. 736, 6 Scott, N. R. 522.

⁵ *Williams v. Hathaway*, 6 Ch. D. 544. Compare with *Bishop Written Laws*, § 65.

⁶ *Goodill v. Brigham*, 1 B. & P. 192, *Eyre, C. J.*, putting the reason thus: "When a devisor gives an estate to a *feme covert* and attempts to relieve her from the disability arising from her coverture, his estate being exhausted, the law must control her enjoyment of it." p. 196.

sistent with the former part of it, which, for the reason just stated, must prevail.¹ Again, —

§ 389. **Order of Clauses.** — Some of the books, particularly the older ones, undertake to give effect to the order of repugnant clauses in writings; often making what is earlier yield to what stands nearer the end, as a later expression of the intent.² This idea is now less insisted upon than formerly, and it is believed to be utterly destitute of practical value.³ In Sheppard's Touchstone, an old distinction within this idea is stated thus: "If there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary. And therefore herein a deed doth differ from a will; for, if there be two repugnant clauses in a will, the first shall be rejected and the latter received."⁴ It is hardly presumable that, at the present day, many courts would much regard this distinction. Surely, in reason, as the whole of a written contract or will was executed simultaneously, there can be in it no first, no middle, no last.

§ 390. **Void for Uncertainty.** — If the meaning of the parties cannot be ascertained from the interpreted writing, — and the case is not one of a latent ambiguity, which, being created by oral testimony, may be orally explained,⁵ — the contract will be void for uncertainty.⁶ Something of this was shown in an earlier chapter.⁷ To add a few of the innumerable illustrations, a promise to sell "forty acres of land" is ordinarily

¹ Robinson v. Payne, 58 Missis. 690.

² 2 Pars. Con. 513, 514.

³ Bishop Written Laws, § 65; Hamilton v. Thrall, 7 Neb. 210.

⁴ Shep. Touch. 88.

⁵ Ante, § 374; 1 Greenl. Ev. § 297; Cubberly v. Cubberly, 7 Halst. 308; McCullough v. Wainright, 2 Harris, Pa. 171; Hiscocks v. Hiscocks, 5 M. & W. 363, 368; Clark v. Powers, 45 Ill. 283; Leonard v. Carter, 16 Wis. 607; Murray v. Blackledge, 71 N. C. 492; Bulkeley v. Wilford, 2 Car. & P. 173, 8 D. & R. 549.

⁶ Ante, § 117, 316; Garnett v. Garnett, 7 T. B. Monr. 545; Grand Gulf Railroad and Banking Co. v. Bryan, 8 Sm. & M. 234; Winslow v. Winslow, 52 Ind. 8; Church, &c. Soc. v. Hatch, 48 N. H. 393; Kleinpeter v. Harrigan, 21 La. An. 196; Tolhurst v. Brickinden, Cro. Jac. 250; Webster v. Ela, 5 N. H. 540; Price v. Griffith, 15 Jur. 1093; Brooklyn Life Ins. Co. v. Bledsoe, 52 Ala. 538; Buckmaster v. Consumers Ice Co. 5 Daly, 313; Atkins v. Van Buren, 77 Ind. 447.

⁷ Ante, § 316.

void;¹ but, in all cases, where parol evidence can duly locate the land,² a general designation is good.³ Though the description appears on its face adequate, it will be void if the parol attempt at identification fails.⁴ The words "this note to be extended if desired by makers," indorsed on it, are too indefinite to have legal effect.⁵ But one's promise to sell to another all the straw he has to spare,⁶ or to deliver a "car-load" of ice,⁷ is sufficiently certain.⁸

§ 391. **Uphold the Transaction.** — The foregoing views disclose, that, if possible, the contract shall be so construed as to carry into effect the purpose of the parties, instead of being void.⁹ Thus, —

§ 392. **Lawful.** — If the terms admit of two meanings, or two ways of effecting the object, by one of which the thing would be unlawful and by the other lawful, the latter construction must be adopted.¹⁰ Or the lawful can be separated from the unlawful, and the contract enforced for the former.¹¹ For illustration, —

§ 393. **Statutory Bond.** — A statutory bond must, to be valid under the statute, conform in substance to the statutory provisions, — a question upon which there are distinctions

¹ *Thompson v. Gordon*, 72 Ala. 455; *Palmer v. Albee*, 50 Iowa, 429; *Moulton v. Egery*, 75 Maine, 485; *Breaid v. Munger*, 88 N. C. 297; *Barnett v. Nichols*, 56 Missis. 622; *Goodbar v. Dunn*, 61 Missis. 618.

² *Ante*, § 376.

³ *Pennington v. Flock*, 93 Ind. 378; *Thomas v. Mathis*, 92 Ind. 560; *Crooks v. Whitford*, 47 Mich. 283; *Tucker v. Field*, 51 Missis. 191; *Thornburg v. Masten*, 88 N. C. 293; *Dorr v. School District*, 40 Ark. 237; *Miller v. Mann*, 55 Vt. 475; *American Emigrant Co. v. Clark*, 62 Iowa, 182; *Grier v. Puterbaugh*, 108 Ill. 602.

⁴ *Bernstein v. Humes*, 71 Ala. 260.

⁵ *Krouskop v. Shontz*, 51 Wis. 204.

⁶ *Parker v. Pettit*, 14 Vroom, 512.

⁷ *Schreiber v. Butler*, 84 Ind. 576.

⁸ The contract was held not to be void in *Crawford v. Geiser Manuf. Co.* 88 N. C. 554; *Raymond v. Rhodes*, 135

Mass. 337; *Miller v. Kendig*, 55 Iowa, 174 ("reasonable amount"); *Cooper v. Hood*, 26 Beav. 293, 4 Jur. n. s. 1266 ("good-will").

⁹ *Pray v. Pierce*, 7 Mass. 381, 384; *Marshall v. Fisk*, 6 Mass. 24, 32; *Reilly v. Chouquette*, 18 Misso. 220; *Milbourne v. Simpson*, 2 Wils. 22; *Thrall v. Newell*, 19 Vt. 202; *Anderson v. Baughman*, 7 Mich. 69; *Gano v. Aldridge*, 27 Ind. 294; *Edwards v. Bailey*, Cowp. 597, 600; *Wells v. Atkinson*, 24 Minn. 161.

¹⁰ *Merrill v. Melchior*, 30 Missis. 516; *Crittenden v. French*, 21 Ill. 598; *Ormes v. Dauchy*, 82 N. Y. 443.

¹¹ *Harrington v. Klopogge*, 4 Doug. 5, 2 Brod. & B. 678, note; *Newman v. Newman*, 4 M. & S. 66. **Presumption.** — It will not be presumed that the law will be violated in carrying out a contract where it can be done lawfully. *Sheffield v. Balmer*, 52 Misso. 474.

not necessary to be here examined minutely.¹ Then, if in such a bond there is matter which the statute does not authorize, it, to render the instrument good, will be rejected as surplusage.² And a writing meant to be a statutory bond, yet void as such for not conforming to the statute,³ may take effect at the common law.⁴ Again, —

§ 394. **Imperfect Deed.** — Where an instrument which the parties executed for a deed of land lacks the necessary seal,⁵ or where the seal was affixed by an agent not duly authorized, or where from the nature of the interest assumed to be conveyed, or from the loss of the instrument without being recorded, or from any other like cause, it cannot operate as a deed, it may be construed as an agreement to convey, if there is no obstacle to its going into operation as such.⁶ The expression sometimes is, that it invests the grantee with an equitable title.⁷ So, —

§ 395. **Sort of Deed.** — If the law, as formerly, and it is believed still in a part of our States, has provided deeds of different sorts for the conveyance of land, — such as bargain and sale, lease and release, covenant to stand seised, and the like, — each for its particular sort of case, then, if in a given instance the parties mistakenly employ one not available for the case, or omit from it something essential to its kind, it will

¹ Post, § 443; *Gardener v. Wood-year*, 1 Ohio, 170; *Commissioner of Insolvents v. Way*, 3 Ohio, 103; *McIntyre v. White*, 5 How. Missis. 298; *Amos v. Allnutt*, 2 Sm. & M. 215; *Commonwealth v. Laub*, 1 Watts & S. 261; *Yale v. Flanders*, 4 Wis. 96; *Lawton v. The State*, 5 Texas, 270; *Baker v. Haley*, 5 Greenl. 240.

² *Hall v. Cushing*, 9 Pick. 395, 404; *United States v. —*, 1 Brock. 195; *Dixon v. United States*, 1 Brock. 177; *Walker v. Chapman*, 22 Ala. 116; *Woods v. The State*, 10 Misso. 698; *Shunk v. Miller*, 5 Barr, 250; *Harper v. Rowe*, 55 Cal. 132.

³ *Lawton v. The State*, 5 Texas, 272.

⁴ *Lane v. Kasey*, 1 Met. Ky. 410; *Rowlet v. Eubank*, 1 Bush, 477; *Gath-*

wright v. Callaway, 10 Misso. 663; *Hester v. Keith*, 1 Ala. 316; *Burroughs v. Lowder*, 8 Mass. 373; *Wolfe v. McClure*, 79 Ill. 564.

⁵ Ante, § 111.

⁶ *McCaleb v. Pradat*, 25 Missis. 257; *Bayler v. Commonwealth*, 4 Wright, Pa. 37; *Porter v. Read*, 19 Maine, 363; *Blight v. Banks*, 6 T. B. Monr. 192; *Cummings v. Coe*, 10 Cal. 529; *Varick v. Edwards*, Hoffman, 382; *Johnson v. Houghton*, 19 Ind. 359; *Conrad v. Schwamb*, 53 Wis. 372; *Rex v. Ridgwell*, 6 B. & C. 665, 9 D. & R. 678; *Dreutzer v. Lawrence*, 58 Wis. 594; *Carey v. Stafford*, 3 Swanst. 427.

⁷ *Grandin v. Hernandez*, 29 Hun, 399; *Jewell v. Harding*, 72 Maine, 124; *Brinkley v. Bethel*, 9 Heisk. 786. See post, § 709.

be enforced as a deed of any other sort which can legally take effect.¹ Likewise, —

§ 396. **Other like Illustrations.** — Of two deeds of the same date and constituting one transaction, that will be presumed to have been made first which will best support the intent.² Trees are a part of the realty which, by the Statute of Frauds, can be conveyed only in writing; but, if one sells them orally, the ineffectual sale will operate, until revoked, as a license to enter upon the land and carry them away.³ And a writing in the form of a receipt may be construed as a bill of sale.⁴

§ 397. **The Subject** — of the contract, and the nature of the transaction, should be considered; and they will more or less influence the interpretation.⁵ Thus, —

§ 398. **Streets** — (**Present and Subsequent**). — Where land is conveyed under the restriction that no building shall be erected thereon within a certain distance of the street, and then the street is altered by public authority, the location of a building, it has been held, must be governed by that of the street as it was at the making of the deed.⁶ But an agreement with a city to remove the dirt and rubbish from the paved streets during a specified period of years was adjudged to include, with the existing streets, those subsequently established.⁷ So a power of attorney to manage all the lands of the principal extends, by interpretation, to those afterward acquired.⁸ Perhaps the particular phraseology in these cases had something to do with the interpretation, still the nature of the transaction and the subject-matter entered into it likewise.⁹ Again, —

¹ Ante, § 42; Shep. Touch. 82, 83, 224; Edwards v. Bailey, Cowp. 597, 600; Wilkinson v. Tranmarr, Willes, 682, 2 Wils. 75.

² Atkyns v. Horde, 1 Bur. 60, 106.

³ Jenkins v. Lykes, 19 Fla. 148; Carrington v. Roots, 2 M. & W. 248.

⁴ Bush v. Bradford, 15 Ala. 317.

⁵ Robinson v. Fiske, 25 Maine, 401; Higgins v. Wasgatt, 34 Maine, 305; Phelps v. Bostwick, 22 Barb. 314; Bailey v. Hill, 77 Va. 492; Pratt v. Pratt, 42 Mich. 174; Penfold v. Universal

Life Ins. Co. 85 N. Y. 317; Grant v. Dabney, 19 Kan. 388; Kennedy v. Richardson, 70 Ind. 524; Myers v. Gross, 59 Ill. 436.

⁶ Tobey v. Moore, 130 Mass. 448. Compare with Lyall v. Edwards, 6 H. & N. 337.

⁷ Crocker v. Buffalo, 90 N. Y. 351.

⁸ Berkey v. Judd, 22 Minn. 287.

⁹ Compare with the doctrine as to statutes extending both to the past and to the future. Bishop Written Laws, § 82-85 b, 176.

§ 399. **Words of Inheritance, or not.** — A deed of land will, in general, convey a fee only when it runs to the grantee and his “heirs.”¹ This comes from technical reasons governing the particular subject, and from ancient usage. But without this word an executory agreement may, and *prima facie*, or in the absence of special facts, it does, bind the party to convey a fee free from incumbrances.² Likewise in a devise, technical words of inheritance are not indispensable to pass a fee.³

§ 400. **Reasonable and Just.** — Interpretation will lean to the rendering which will make the contract reasonable and just.⁴ Thus, —

§ 401. **Mutual Promises — (Dependent or Independent).** — Where it consists of mutual promises, the promise on the one side being the consideration for that on the other,⁵ the construction which renders them dependent, so that neither party can sue the other unless himself ready to perform, will be preferred to the one making them independent, because more reasonable and just.⁶ But this rule must yield, as other rules do, to the intent of the parties when it duly appears, and to the nature of their agreement.⁷

§ 402. **Grammatical Construction — Punctuation.** — Nor will the strict grammatical construction, or the punctuation, pre-

¹ Hogan v. Welcker, 14 Misso. 177; Martin v. Long, 3 Misso. 391; Nicholson v. Caress, 59 Ind. 39; Jordan v. McClure, 4 Norris, Pa. 495.

² Bodley v. Ferguson, 30 Cal. 511; Hughes v. Parker, 8 M. & W. 244; Gaule v. Bilyeau, 1 Casey, Pa. 521; Defraunce v. Brooks, 8 Watts & S. 67; Bower v. Cooper, 2 Hare, 408; Ungley v. Ungley, 5 Ch. D. 887, 891.

³ 4 Kent Com. 535.

⁴ Halloway v. Lacy, 4 Humph. 468; Baron v. Placide, 7 La. An. 229; Bickford v. Cooper, 5 Wright, Pa. 142; Royalton v. Royalton, &c. Turnpike, 14 Vt. 311; Myers v. Gross, 59 Ill. 436.

⁵ Ante, § 76-79.

⁶ Mecum v. Peoria, &c. Railroad, 21 Ill. 533; Peques v. Mosby, 7 Sm. & M.

340; Liddell v. Sims, 9 Sm. & M. 596; Clopton v. Bolton, 23 Missis. 78; Hamilton v. Thrall, 7 Neb. 210.

⁷ Pordage v. Cole, 1 Saund. Wms. ed. 319*l*, and the notes; McCrelish v. Churchman, 4 Rawle, 26; Tileston v. Newell, 13 Mass. 406, 411; Johnson v. Reed, 9 Mass. 78; Howland v. Leach, 11 Pick. 151, 154; Gardiner v. Corson, 15 Mass. 500; Bean v. Atwater, 4 Conn. 3; Todd v. Summers, 2 Grat. 167; Evans v. Fegely, 17 Smith, Pa. 370; Runkle v. Johnson, 30 Ill. 328; Gillum v. Dennis, 4 Ind. 417; Sewall v. Wilkins, 14 Maine, 168; Hutchings v. Moore, 4 Met. Ky. 110; Kettle v. Harvey, 21 Vt. 301; Booth v. Tyson, 15 Vt. 515; Stansbury v. Fringer, 11 Gill & J. 149.

vail over the evident intent.¹ Still these and all other like things, when they appear in the writing, may be looked to as helps to the meaning.² On this principle, —

§ 403. **Double Commas** — may have the effect of the word “ditto.”³

§ 404. **Meaning of the Words.** — The language and terms of the contract will be understood in the ordinary, popular sense;⁴ unless they relate to some technical subject, — as, a particular trade or science, the law, or a custom, — in which case their technical meaning will be given them.⁵ But if, from the connection, or from the subject, it is apparent that the parties did not employ them so, or according to their true definitions, they will receive the meaning thus shown to have been intended. For example, “give” has been construed as “pay” when applied to money, and “convey” when applied to land.⁶ And “children” has been rendered, contrary to the legal sense, as signifying heirs.⁷ Indeed, in these cases, as in others, the interpretation is to carry into effect the intent of the parties, as derivable from the whole instrument and the surroundings, whether they employed language accurately or not.⁸

§ 405. **Technical or not.** — Though in a particular contract

¹ *Morey v. Homan*, 10 Vt. 565; *Netleton v. Billings*, 13 N. H. 446; *English v. McNair*, 34 Ala. 40; *White v. Smith*, 9 Casey, Pa. 186; *Ewing v. Burnet*, 11 Pet. 41; *Reeves v. Topping*, 1 Wend. 388; *Hancock v. Watson*, 18 Cal. 137; *Osborn v. Farwell*, 87 Ill. 89.

² *Leake Con.* 221; *White v. Smith*, 9 Casey, Pa. 186; *Willis v. Martin*, 4 T. R. 39, 65, 66; *Wangh v. Middleton*, 8 Exch. 352, 357; *Bishop Written Laws*, § 78, 81.

³ *Steinmetz v. Versailles, &c. Turnpike*, 57 Ind. 457, 460.

⁴ *Hawes v. Smith*, 3 Fairf. 429; *Mansfield, &c. Railroad v. Veeder*, 17 Ohio, 385; *Bradshaw v. Bradbury*, 64 Misso. 334; *Griffith v. Harrison*, 4 T. R. 737, 749.

⁵ *Findley v. Findley*, 11 Grat. 434; *Rindskoff v. Barrett*, 14 Iowa, 101;

Rogers v. Danforth, 1 Stock. 289; *McAvoy v. Long*, 13 Ill. 147; *Wayne v. The General Pike*, 16 Ohio, 421; *Eaton v. Smith*, 20 Pick. 150; *Ellmaker v. Ellmaker*, 4 Watts, 89; *Robinson v. Fiske*, 25 Maine, 401.

⁶ *Carter v. Alexander*, 71 Misso. 585. To the like effect, *Jewry v. Busk*, 5 Taunt. 302.

⁷ *Warn v. Brown*, 6 Out. Pa. 347.

⁸ *Wadlington v. Hill*, 10 Sm. & M. 560; *Pavey v. Burch*, 3 Misso. 447; *Marvin v. Stone*, 2 Cow. 781; *Quackenboss v. Lansing*, 6 Johns. 49; *Watchman v. Crook*, 5 Gill & J. 239; *Killian v. Harshaw*, 7 Ire. 497; *Shoenberger v. Hay*, 4 Wright, Pa. 132; *Foley v. Cowgill*, 5 Blackf. 18; *Wallis v. Smith*, 21 Ch. D. 243, 257; *De Witt v. Buckley*, 11 Stew. Ch. 291; *Cook v. Lillo*, 103 U. S. 792.

technical words might be appropriate, it will be equally good without them if the meaning is plain.¹

§ 406. **General and Specific.** — Where there are general and specific words and phrases, and all cannot stand together in their proper significations, those of wider import will be restrained by those of narrower, and the less by the more exact. This rule will be applied only when the expressions cannot be otherwise reconciled, and it will always yield to the plain intent of the parties.² For example, —

§ 407. **Recitals.** — General words may be limited by the recitals.³ So, —

§ 408. **Description of Land conveyed.** — If in a deed land is described by metes and bounds, or by other visible objects, they, being specific and exact, will restrain and control words of general description ;⁴ while still the courses, distances, and the like will aid as they may.⁵ Yet this rule will not be carried so far as to defeat the conveyance where, by the rejection of a call for a monument, it can be made good.⁶ And in various other instances it will yield, for no one rule is universally supreme.⁷ Again, —

§ 409. **General after Particular.** — A clause in wider terms, following a specific enumeration, will generally be restricted by interpretation to things of a like sort with those enumerated.⁸ But the restriction will not be applied to defeat a

¹ *Barney v. Worthington*, 37 N. Y. 112; *Chesapeake, &c. Canal v. Baltimore, &c. Railroad*, 4 Gill & J. 1; *Lovering v. Lovering*, 13 N. H. 513; *Polhemus v. Heiman*, 45 Cal. 573.

² *Browning v. Wright*, 2 B. & P. 13; *Hesse v. Stevenson*, 3 B. & P. 565; *Barton v. Fitzgerald*, 15 East, 530; *Holmes v. Martin*, 10 Ga. 503; *Heywood v. Heywood*, 42 Maine, 229; *Field v. Huston*, 21 Maine, 69; *Moore v. Griffin*, 22 Maine, 350; *Huntington v. Havens*, 5 Johns. Ch. 23; *Herrick v. Hopkins*, 23 Maine, 217; *Corwin v. Hood*, 58 N. H. 401.

³ *Boyes v. Bluck*, 13 C. B. 652; *Walsh v. Trevanion*, 15 Q. B. 733, 751; *Payler v. Homersham*, 4 M. & S. 423, 425; *Rich v. Lord*, 18 Pick. 322, 325.

⁴ *Emery v. Fowler*, 38 Maine, 99; *Bosworth v. Sturtevant*, 2 Cush. 392; *Dawes v. Prentice*, 16 Pick. 435; *Butler v. Widger*, 7 Cow. 723; *Whiting v. Dewey*, 15 Pick. 428; *Dalton v. Rust*, 22 Texas, 133; *Richardson v. Chickering*, 41 N. H. 380; *Blasdel v. Bissell*, 6 Barr, 258; *Cunningham v. Curtis*, 57 N. H. 157.

⁵ *Tyler v. Fickett*, 73 Maine, 410.

⁶ *White v. Luning*, 93 U. S. 514; *Miller v. Bryan*, 86 N. C. 167.

⁷ *Hamilton v. Foster*, 45 Maine, 32; *Sawyer v. Kendall*, 10 Cush. 241, 246; *Bradford v. Pitts*, 2 Mill, 115.

⁸ *Anonymous*, Lofft, 398; *Pollock Con.* 409 (referring to *Rooke v. Kensington*, 2 Kay & J. 753, 771, and *Bulkley v. Wilford*, 8 D. & R. 549); *Meyrick*

larger intent; as, if a party makes for the benefit of his creditors an assignment wherein, after enumerating various sorts of personal property, he adds "and all his personal estate whatsoever," the latter clause will carry a term for years, though it is not within any species named, because the expression is in itself wide enough, and the term is within the evident intent of the instrument.¹ On the other hand, where there is a power of attorney to do a particular act, followed by general words, the latter are limited in their construction to what is essential to the act; for plainly the parties did not contemplate more.²

§ 410. **Derogation of Law.** — Terms in a contract in derogation of law — that is, establishing for the particular instance a rule contrary to what the law would provide — are, like provisions in a statute in derogation of the common law,³ construed strictly.⁴ For instance, —

§ 411. **Limiting Carrier's Liability.** — It is so when a common carrier undertakes to limit his liability by a special agreement with the party; he can claim nothing beyond what is plainly within the words.⁵

§ 412. **Parties' Interpretation.** — In a case of doubt, the interpretation which the parties by their acts under their contract have practically given it, will have weight, and it may be controlling.⁶ But this rule will not be suffered to overthrow the plain terms of an agreement.⁷

§ 413. **Written and Printed.** — If the contract is made from

v. Meyrick, 2 Tyrw. 178, 2 Crompt. & J. 223.

¹ *Ringer v. Cann*, 3 M. & W. 343, 347, 348.

² *Perry v. Holl*, 2 De G. F. & J. 38, 6 Jur. n. s. 661. To the like effect, *Rountree v. Denson*, 59 Wis. 522.

³ *Bishop Written Laws*, § 119, 155.

⁴ *Duffel v. Boykin*, 9 La. An. 295; *Delaware, &c. Tow-boat Co. v. Starrs*, 19 Smith, Pa. 36.

⁵ *Menzell v. Railway*, 1 Dillon, 531; *Baltimore, &c. Railroad v. Brady*, 32 Md. 333; *Lamb v. Camden, &c. R. and T. Co.* 46 N. Y. 271; *The City of Norwich*, 4 Ben. 271.

⁶ *French v. Pearce*, 8 Conn. 439; *Jakeway v. Barrett*, 38 Vt. 316; *Chicago v. Sheldon*, 9 Wal. 50, 54; *Farrar v. Rowly*, 2 La. An. 475; *D'Aquin v. Barbour*, 4 La. An. 441; *Casey v. Pennoyer*, 6 La. An. 776; *Coleman v. Grubb*, 11 Harris, Pa. 393; *Hamm v. San Francisco*, 17 Fed. Rep. 119; *Camden, &c. Land Co. v. Lippincott*, 16 Vroom, 405. See *Dunn v. Mobile Bank*, 2 Ala. 152; *Hutchins v. Dixon*, 11 Md. 29.

⁷ *Citizens Fire Ins. &c. Co. v. Doll*, 35 Md. 89; *Bishop v. White*, 68 Maine, 104.

a printed blank, the printed matter is as much a part of it as the written.¹ But as the printed words are general, intended for any like occasion, and the written were specially selected for the particular instance,² the latter, in a case of conflict, will prevail.³ Still interpretation will reconcile all where it reasonably can ;⁴ and, as a means to this end, will give greater weight to the written parts than to the printed.⁵ In government contracts, prepared on printed blanks, it has been deemed important that the unchanging portions should receive a uniform construction.⁶

§ 414. **Words of Party Speaking.** — A rule not very important, but resorted to when all other means fail,⁷ is, that, in a deed-poll, or other writing of the like sort, the words shall be taken in their strict sense against the grantor, or him who employs them, and liberally in favor of the other party.⁸ By a part of the authorities, and perhaps by the better reason, on a question not quite clear in principle, this rule is not applicable to contracts subscribed by both parties, such as indentures ; “because,” in them, “the law makes each party privy to the speech of the other.”⁹ But, by other authorities, the rule seems to be applicable equally to them.¹⁰ There is one exception ; namely, —

§ 415. **State or Crown.** — Where the State with us, or in England the Crown, is a party on the one side, and a subject

¹ *Wallwork v. Derby*, 40 Ill. 527.

² *Robertson v. French*, 4 East, 130, 136.

³ *Hernandez v. Sun Mutual Ins. Co.*

⁶ *Blatch*, 317 ; *American Express Co. v. Pinckney*, 29 Ill. 392 ; *Howard Fire Ins. Co. v. Bruner*, 11 Harris, Pa. 50 ; *Chadsey v. Guion*, 97 N. Y. 333.

⁴ *Wheeling, &c. Railroad v. Gourley*, 3 Out. Pa. 171.

⁵ *Clark v. Woodruff*, 83 N. Y. 518.

⁶ *Yates v. United States*, 15 Ct. of Cl. 119.

⁷ *Falley v. Giles*, 29 Ind. 114.

⁸ *Green's Case*, 1 Leon. 218 ; *Drinkwater v. London Assurance Corp.* 2 Wils. 363 ; *Beeson v. Patterson*, 12 Casey, Pa. 24 ; *Bennehan v. Webb*, 6 Ire. 57 ;

Wells v. Pacific Ins. Co. 44 Cal. 397 ; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106 ; *Winslow v. Patten*, 34 Maine, 25 ; *Salisbury v. Andrews*, 19 Pick. 250, 253 ; *Hoey v. Jarman*, 10 Vroom, 523 ; *Duryea v. New York*, 62 N. Y. 592 ; *Rolker v. Great Western Ins. Co.* 4 Abb. Ap. 76 ; *Richardson v. People*, 85 Ill. 495 ; *Gantz v. District of Columbia*, 18 Ct. of Cl. 569 ; *Teutonia Ins. Co. v. Boylston Mut. Ins. Co.* 20 Fed. Rep. 148 ; *Warde v. Warde*, 16 Beav. 103.

⁹ *Staunford and Walsh in Browning v. Beston*, 1 Plow. 131, 134 ; *Say's Case*, 10 Mod. 40, 47 ; *Met. Con.* 312.

¹⁰ 1 Chit. Con. 11th Am. ed. 136 ; *Browning v. Wright*, 2 B. & P. 13, 22.

is a party on the other, the entire contract is construed more strongly against the subject.¹

§ 416. **Made Certain.** — The maxim applies in all cases, that what can be made certain is certain. For example, since there can be no heirs to a living person, a deed to such person's "heirs" is void;² yet there can be a good deed to those of one deceased, for now he may have heirs who, though not named, can be ascertained.³ So a conveyance to a living person's "children" is effectual if he has children.⁴

§ 417. **Odious or Favored.** — An important distinction in statutory interpretation is between things odious and things favored; statutes creating the former sort being construed strictly, the latter liberally.⁵ A like principle, though not commonly designated by the same phrase, is recognized in construing contracts; the court leans to what is beneficial, mutual,⁶ and just as between the parties, and discourages whatever is inequitable.⁷ Therefore it holds, for example, forfeitures and penalties in disfavor.⁸ So that —

§ 418. **Condition or Covenant.** — The court, when it reasonably can, will construe a clause as a promise or covenant, rather than as a condition working a forfeiture.⁹ Not even will it necessarily give the latter effect to the word "condition."¹⁰ And a clause which it accepts as a condition it will interpret strictly, as not extending in meaning "beyond their words, unless it be in some special cases."¹¹ There are conditions not within the reason of this rule, therefore variously rendered, each according to its special requirements.¹²

¹ *Canal Commissioners v. People*, 5 Wend. 423, 459; *The State v. Morgan*, 28 La. An. 482; *Attorney-General v. Ewelme Hospital*, 17 Beav. 366.

² *Winslow v. Winslow*, 52 Ind. 8.

³ *Shaw v. Loud*, 12 Mass. 447; *Boone v. Moore*, 14 Misso. 420.

⁴ *Hamilton v. Pitcher*, 53 Misso. 334. And see *Adams v. King*, 16 Ill. 169.

⁵ *Bishop Written Laws*, § 192 et seq.

⁶ *Bangor Furnace Co. v. Magill*, 108 Ill. 656.

⁷ Ante, § 400; *Royalton v. Royalton*,

&c. *Turnpike*, 14 Vt. 311; *Akin v. United States*, 17 Ct. of Cl. 260; *Parkhurst v. Smith, Willes*, 327, 332; *Stadhard v. Lee*, 3 B. & S. 364, 9 Jur. n. s. 908.

⁸ *Taylor v. Paterson*, 9 La. An. 251.

⁹ *Crane v. Hyde Park*, 135 Mass. 147; *Sanders v. Maclean*, 11 Q. B. D. 327, 337; *Wier v. Simmons*, 55 Wis. 637; *Duryee v. New York*, 96 N. Y. 477.

¹⁰ *Hayne v. Cummings*, 16 C. B. n. s. 421; *Dunlap v. Mobley*, 71 Ala. 102; *Shep. Touch.* 122.

¹¹ *Shep. Touch.* 133.

¹² *Kellam v. McKinstry*, 69 N. Y. 264;

III. *Precedence of the Rules.*

§ 419. **Nature of Question — Practical Skill.** — The books afford little instruction on the subject of this sub-title. Yet they teach us the obvious truths, that not all the cases require rules,¹ that not every rule is applicable in every case calling for rules; and that, in a particular instance, one only may suffice, or several may be applied together. Likewise observation shows us, that there is no absolute order of precedence among them, yet in a modified sense there is something like such order. The question is mainly one of practical, judicial skill in the interpreter. Gladly would the author impart this skill, but it must come chiefly from a Higher Power and from study and practice. To illustrate, —

§ 420. **Following the Intent.** — The rule of following the intent of the parties, to which is assigned the highest place,² is, while in one aspect superior to all, in another inferior to a part of the rest. Thus, if such intent “be apparently against law, then the construction shall not apply the deed to their intent; as, if one give land to another and his *heirs* for twenty years, in this case the *executor*, and not the heir, shall have this land after the death of him to whom it is given.” For the estate thus created is personalty; which, by the law, vests in the executor and not the heir.³ Moreover, this apparently superior rule is limited by the rules which exclude oral evidence of what has been reduced to writing, and hold the parties to mean that to which they have subscribed their names.

§ 421. **Other Illustrations.** — The rule which interprets the language against the party speaking, is, by its terms, an inferior one;⁴ and still more inferior is that, if it is a rule, which gives preference to the later words in the same instrument.⁵ It is certain that these two rules, and various others,

Dix v. Atkins, 130 Mass. 171; Winona v. Minnesota Railw. Constr. Co. 27 Minn. 415; Cooper v. McKee, 53 Iowa, 239.

¹ Ante, § 379.

² Ante, § 380.

³ Shep. Touch. 86.

⁴ Ante, § 414.

⁵ Ante, § 389.

— as, for example, the one which limits general words by specific,¹ — stand in all cases subordinate to the one of following the intent.² Other illustrations are given in connection with the rules themselves. Not pausing longer on these questions, we proceed to the —

§ 422. **Supreme Rule.** — For this sub-title the supreme rule is, that the interpreter shall inform himself of the legal doctrines connected with the subject of the particular contract, and with the rules for the interpretation of contracts; then, in applying the rules, that he shall suffer those adapted to influence the question to exert, each what his judgment teaches to be its proper force, and all so to operate together, with the precedence of the one over the other which he deems to be due in the particular instance, as to work out the result which best satisfies his understanding.

§ 423. **Finally,** — it is believed that anything more specific under this sub-title is not in its nature attainable, and that to attempt it would be only to mislead.

IV. *Further Explanations.*

§ 424. **In Parts, differing.** — If a contract is made in duplicate, — for example, if it is an indenture, — neither part is to be preferred over the other,³ unless the parties have treated the one, rather than the other, as expressing their true meaning.⁴ Then, should the parts differ, construction will, if it can, reconcile them or determine which embodies the correct reading;⁵ but, if it finds this impossible, it will hold all void for the uncertainty.⁶

§ 425. **Implications** — from the stipulations in contracts are considered in another chapter.⁷

§ 426. **Specialty and Parol Written, compared** — (**Parties**). — Words signify the same in sealed and unsealed contracts;

¹ Ante, § 406.

² *Emigrant Indus. Sav. Bank v. Roche*, 93 N. Y. 374; *Foot v. Ætna Life Ins. Co.* 61 N. Y. 571.

³ *Munson v. Osborn*, 10 Bradw. 508.

⁴ *Wynne's Case*, Law Rep. 8 Ch. Ap. 1002.

⁵ *Munson v. Osborn*, supra; *Burchell v. Clark*, 2 C. P. D. 88.

⁶ *Wynne's Case*, supra.

⁷ Ante, § 239 et seq.

“for,” adds Lord Ellenborough, “the same intention must be collected from” them in the one case as in the other.¹ Still there is, in England and a part of our States, a difference much worn away in other States, as to the consequences of the provisions. Thus, in various circumstances, persons to be benefited by a contract not under seal, yet not otherwise parties, may be parties to an action thereon.² But only those who are parties on the face of a specialty can sue or be sued upon it; not even can persons named in it as beneficially interested,³ or an undisclosed principal whose authorized agent had sealed an agreement really in his behalf.⁴ Such is the general doctrine, in some degree qualified by different courts.⁵ It does not, for example, extend in all its strictness to a deed-poll,⁶ upon which often one not otherwise than descriptively named may sue.⁷ Likewise signing and sealing a writing may make one a party to it, though his name does not otherwise appear therein.⁸ And, in some of our States, specialties seem to follow, in the foregoing particulars, the rules governing simple contracts; as, for example, in permitting one beneficially interested to maintain a suit at law thereon.⁹

§ 427. **Law and Equity, compared.** — The meaning of a contract cannot vary with the tribunal. Hence the interpretation is the same in courts of law and in those of equity.¹⁰

¹ *Seddon v. Senate*, 13 East, 63, 74. See *Southwell v. Bowditch*, 1 C. P. D. 374.

² See, for example, *Welch v. Goodwin*, 123 Mass. 71; *Nave v. Lebanon Bank*, 87 Ind. 204; *George v. Tate*, 102 U. S. 564; post, § 1219.

³ *Salter v. Kidgley*, Carth. 76, 77; *Colyear v. Mulgrave*, 2 Keen, 81; *Chesterfield, &c. Co. v. Hawkins*, 3 H. & C. 677, 11 Jur. n. s. 468; *Gardner v. Lachlan*, 8 Sim. 123; *Barford v. Stuckey*, 8 Moore, 88, 1 Bing. 225; *Hornbeck v. Westbrook*, 9 Johns. 73; *Heath v. Gregory*, 1 Jones, N. C. 417; *Berkeley v. Hardy*, 5 B. & C. 355, 359; *Sandusky v. Neal*, 2 Bradw. 624; *Quigley v. De Haas*, 1 Norris, Pa. 267; *Gautzert v. Hoge*, 73 Ill. 30; *Storer v. Gordon*, 3 M. & S. 308, 322.

⁴ *Borcherling v. Katz*, 10 Stew. Ch. 150; *Mahoney v. McLean*, 26 Minn. 415.

⁵ For illustration, *Gandy v. Gandy*, 30 Ch. D. 57; post, § 427.

⁶ *Leake Con.* 445.

⁷ *Sunderland Marine Ins. Co. v. Kearney*, 16 Q. B. 925, 937, 938, 15 Jur. 1006; *Seymour v. Western Railroad*, 106 U. S. 320; *Barkley v. Tarrant*, 20 S. C. 574.

⁸ *Howell v. Parsons*, 89 N. C. 230; *State Lunatic Asylum v. Douglas*, 77 Misso. 647; *Grimmet v. Henderson*, 66 Ala. 521, 525; *Elliot v. Sleeper*, 2 N. H. 525.

⁹ *Emmitt v. Brophy*, 42 Ohio State, 82; *Bassett v. Hughes*, 43 Wis. 319.

¹⁰ *Hotham v. East India Co.* 1 Doug. 272, 277.

There are apparent exceptions;¹ but reflection will show that, in the main or altogether, they come from differences of practice or jurisdiction. Thus, a *cestui que trust* under a sealed instrument may, contrary to the rule at law as stated in the last section, maintain thereon a suit in equity.² But this difference and some others which will occur to the reader do not, in a just view, pertain to the interpretation.

§ 428. *The Doctrine of this Chapter restated.*

All language consists of words the meanings whereof vary with their connections, with their subject, and with other things. Without such flexibility, not even Infinite Wisdom could construct a language sufficiently voluminous, yet comprehensible by man, to convey his ever-changing and still progressing thoughts. Only by taking advantage of this element in language, is any new idea or fresh form of thought expressed. So that the diversities of meanings are, not only beneficial, but absolutely essential to human progress. In the law, a few words have one unvarying signification when employed as a vehicle for legal ideas, but this is rather the exception than the rule. Now, —

We have here the key to all verbal interpretation of contracts. The interpreter, seeking to ascertain what the parties meant, does not to any great extent proceed on technical grounds; but, pressing into service his knowledge of the nature of language in general and of the particular language, and employing as helps the rules which his predecessors have found efficient, he endeavors to ascertain the meanings which good sense will ratify as just. The rule which seems most nearly technical is, that written words are not to be expanded or qualified by any oral expressions; but the intent of the parties is to be drawn from them alone, examined in connection with the surroundings, the subject, and the laws of the language. Some of the other rules are commonly deemed technical, yet mostly to a less degree. They need not be here repeated.

¹ Pollock Con. 441 et seq.

² Gandy v. Gandy, 30 Ch. D. 57.

CHAPTER XV.

THE INTERPRETATION OF THE CONTRACT AS TO ITS
EFFECT.

§ 429. **Elsewhere — Here.** — In the next chapter we shall consider how law, custom, and usage mingle with the terms of a contract, enlarging, qualifying, and limiting them. In a chapter further on we shall see how the law interposes to prevent the taking effect of any agreement contrary to its rules or its policy. The purpose of this chapter, which in subject is analogous to the others, is, in a sort of preliminary way, to contemplate the effect given by the law to the undertakings of the parties. No full exposition will be attempted.

§ 430. **In General.** — The law has its somewhat varying rules governing different classes of parties, different classes and subjects of contract, and different tribunals; therefore the effect of any agreement will depend largely upon the parties, upon its subject, and whether the court is one of law or of equity. Each litigated question will be determined, not simply by the law in general, but by the interpreted contract as thus specially applied. To illustrate, —

§ 431. **Promissory Note.** — One executing a promissory note brings himself within the law-merchant, which governs this species of contract; as, for example, he may be required to pay it to any person to whom it is lawfully transferred,¹ and he is entitled to the customary days of grace.² But, —

¹ *Fleckner v. United States Bank*, 8 Wheat. 338; *Guild v. Eager*, 17 Mass. 615; *Harlow v. Boswell*, 15 Ill. 56; *Holeman v. Hobson*, 8 Humph. 127.

² *Craft v. State Bank*, 7 Ind. 219; *Wood v. Corl*, 4 Met. 203.

§ 432. **Common Carrier.** — If a common carrier, in words corresponding to those of a promissory note, undertakes to deliver to the order of another a package of merchandise, he incurs a different sort of liability. No days of grace are permitted him, but the work must be promptly done;¹ and any right of action against him is, not in one to whom his promise has been assigned, but in the consignor, or consignee, or person acting for the one or the other, as determined by the principles governing ordinary contracts.² His obligations are fixed by the law applicable to him.³ Thus, he is an insurer of the goods against fire, thefts, and all casualties not proceeding from the act of God or the public enemy, though not a word on the subject has passed between him and the owner.⁴ In like manner, —

§ 433. **Insurance.** — A policy of insurance, especially of marine insurance, is but an imperfect guide to the real contract. Very much depends on usage, and on rules of law special to this species of agreement.⁵ So, —

§ 434. **Law or Equity — (Damages or Specific Performance).** — One who seeks redress for the breach of a contract can, in a court of law, recover only money damages;⁶ but, in various circumstances, a court of equity will compel the defendant to do the particular thing which he had promised.⁷ Again, —

§ 435. **Executors.** — If, after one has entered into a contract, he dies, the law transmits his interest therein to his

¹ *Scovill v. Griffith*, 2 Kern. 509, 515; *Price v. Hartshorn*, 44 Barb. 655; *Smith v. Whitman*, 13 Misso. 352; *Nettles v. South Carolina Railroad*, 7 Rich. 190; *Cleveland, &c. Railroad v. Perkins*, 17 Mich. 296; *Philleo v. Sanford*, 17 Texas, 227.

² *Sanford v. Housatonic Railroad*, 11 Cush. 155; *Price v. Powell*, 3 Comst. 322; *Stimpson v. Gilchrist*, 1 Greenl. 202; *D'Anjou v. Deagle*, 3 Har. & J. 206; *Elkins v. Boston, &c. Railroad*, 19 N. H. 337; *Green v. Clark*, 13 Barb. 57.

³ *Thurman v. Wells*, 18 Barb. 500; *Hooper v. Wells*, 27 Cal. 11.

⁴ 2 Kent Com. 597; *Graff v. Bloomer*, 9 Barr. 114; *Klauber v. American Express*, 21 Wis. 21; *Joyce v. Kennard*, Law Rep. 7 Q. B. 78.

⁵ See, for example, *Rankin v. Potter*, Law Rep. 6 H. L. 83, 101, 110, 155; *Parkhurst v. Gloucester Mutual Fishing Ins. Co.* 100 Mass. 301.

⁶ 1 Story Eq. § 714; 1 Pars. Con. 490; *Leake Con.* 1043.

⁷ 1 Story Eq. § 712 et seq.; 2 Kent Com. 487, note.

executor or administrator who, therefore, though not named, may sue thereon.¹

§ 436. **Procedure.**—The varying course of judicial procedure furnishes numerous illustrations of the effect of the law upon a contract. Practically a party is bound simply to the extent to which the law will compel him. It is sufficient in this place that the reader's attention is directed to the topic; ample illustrations will appear in other connections, in this and other books.

· § 437. *The Doctrine of this Chapter restated.*

The law has its own rules for the guidance of people. It permits them, not absolutely, but within defined limits, to provide by contract differing and additional ones. These and the rules of law operate together in determining the rights and responsibilities of the parties, and the consequences of the violation of duties thus assumed. Hence not unfrequently the effect of a contract differs considerably from what would be supposed by one unacquainted with the law.

¹ *Emes v. Hancock*, 2 Atk. 507; *Darthez v. Winter*, 2 Sim. & S. 536.

CHAPTER XVI.

LAW, CUSTOM, AND USAGE AS ELEMENTS IN THE CONTRACT.

§ 438. Introduction.

439-443. Law an Element.

444-448. Nature of Custom and Usage.

449-459. Their Effect in a Contract.

460. Doctrine of Chapter restated.

§ 438. **How Chapter divided.** — We shall consider, I. The Law as an Element; II. The Nature of Custom and Usage; III. Their Effect in a Contract.

I. *The Law as an Element.*

§ 439. **Law as Part of Contract.** — It is but following up the doctrine of the last chapter to say, that the law is to be deemed a part of every contract; that is, ordinarily, the law as it exists at the time and place of the making.¹ Thus, —

§ 440. **Partnership.** — Whenever the court construes a contract to create a partnership between the parties, it will apply the law of partnership to questions not settled by its terms.² Now, —

§ 441. **Limitations.** — While the doctrine is commonly stated thus broadly in the books, and while in the main it is certainly so, it is believed to have some, though not extensive, limita-

¹ Webster v. Rees, 23 Iowa, 269; Clark v. Pinney, 7 Cow. 681; Rogers v. Allen, 47 N. H. 529; The State v. Allis, 18 Ark. 269; Roberts v. Cocke, 28 Grat. 207; Van Schoonhoven v. Curley, 86 N. Y. 187; O'Kelly v. Williams, 84 N. C. 281; Elliot v. Northeastern Railway, 10 H. L. Cas. 333; Brine v. In-

surance Co. 96 U. S. 627; Banks v. De Witt, 42 Ohio State, 263.

² Ludlow v. Cooper, 4 Ohio State, 1; Livingston v. Cox, 6 Barr, 360; Kramer v. Arthurs, 7 Barr, 165; Honore v. Colmesnil, 1 J. J. Mar. 506; Allen v. Davis, 13 Ark. 28.

tions,¹ into which we need not particularly in this place inquire. There are statutory changes which may operate even on the expressed terms of a contract; as, for example, where a landowner had covenanted that neither he nor his assigns would build on certain land, then, a statute authorizing, a railway company took it, whereupon he assigned it to the company, this statutory act of the law was held to have discharged him from his covenant.² On the other hand, under our written constitutions, rights which in any manner have vested cannot thus be taken away.³

§ 442. **Law's Channels.** — The doctrine that the law constitutes a part of the contract explains why it is, that no stipulations of parties can cause their rights to flow otherwise than in the channels of the law. For example, a freehold in lands cannot be granted to commence *in futuro*; ⁴ no estate or fund can be created to be perpetually inalienable; ⁵ and one cannot sell what he neither actually nor potentially has. ⁶ Illustrations of this principle might be multiplied indefinitely.

§ 443. **Under Statute.** — As already seen, ⁷ a bond or other contract provided for by statute should in substance, or so far as not to defeat the purpose of the legislature, conform to the statutory terms. ⁸ Especially will a material omission render the contract void. ⁹ Yet it may be good while departing in a less degree from the words of the enactment; ¹⁰ even a bond with one surety has been held to be valid where the statute (construed to be directory ¹¹) requires two. ¹²

¹ See, for some illustrations, 2 Bishop Mar. Women, § 565–573.

² Baily v. De Crespigny, Law Rep. 4 Q. B. 180.

³ Bishop Written Laws, § 85 a, 175.

⁴ Met. Con. 306; Stukeley v. Butler, Hob. 168; Hawes v. Stebbins, 49 Cal. 369.

⁵ 4 Kent Com. 271; Bates v. Bates, 134 Mass. 110; In re Macleay, Law Rep. 20 Eq. 186, 190; Mott v. Ackerman, 92 N. Y. 539; Hershey v. Clark, 35 Ark. 17.

⁶ Grantham v. Hawley, Hob. 132.

⁷ Ante, § 393.

⁸ Nunn v. Goodlett, 5 Eng. 89; San-

ders v. Rives, 3 Stew. 109; Hall v. Cushing, 9 Pick. 395, 404; The State v. Bright, 14 S. C. 7.

⁹ Dixon v. United States, 1 Brock. 177; United States v. Gordon, 1 Brock. 190, 7 Cranch, 287; United States v. Morgan, 3 Wash. C. C. 10.

¹⁰ Van Deusen v. Hayward, 17 Wend. 67; Ring v. Gibbs, 26 Wend. 502; Smith v. Taylor, 56 Ga. 292.

¹¹ Bishop Written Laws, § 255.

¹² People v. Johr, 22 Mich. 461. Contra, Cutler v. Roberts, 7 Neb. 4. And see Gregory v. Cameron, 7 Neb. 414. The addition of a surety not required by the statute does not render

II. *The Nature of Custom and Usage.*

§ 444. "Custom," "Usage," "Prescription." — In the English books, particularly the older ones, there are distinctions between these words, not necessary to be minutely considered in this connection.¹ "Custom," in its more technical sense, is a usage so long continued "that the memory of man runneth not to the contrary."² But our country is too recently settled to have customs strictly within this definition.³ And in our books the term is often employed as a synonyme of "usage."⁴ What we are here particularly considering is any established course of things which, while not ripened into law, may have entered as an element into a contract. It may be, but it is not necessarily, ancient; still the term of its duration is commonly important, particularly on the question of its having been known to the parties.⁵ Yet, —

§ 445. **Custom as Law.** — When any custom has become general throughout the State, among all classes of people, the courts take judicial cognizance of it; for, in the words of Caton, C. J., they "will not pretend to be more ignorant than the rest of mankind."⁶ It is now, therefore, a part of the common law of the State; and ceases to be termed, in ordinary legal language, custom.⁷

§ 446. **Custom as Usage — Distinguished from Law.** — The leading distinction between custom, considered as usage, and

the instrument void. *Jenkins v. Lockard*, 66 Ala. 377.

¹ And see *Lowry v. Read*, 3 Brews. 452.

² 1 Bl. Com. 76; *Ocean Beach Assoc. v. Brinley*, 7 Stew. Ch. 438; *Knowles v. Dow*, 2 Fost. N. H. 387.

³ *Ocean Beach Assoc. v. Brinley*, *supra*.

⁴ *Richmond v. Union Steamboat Co.* 87 N. Y. 240, 249, Earl, J. observing, "It will be seen by an examination of the cases above cited, and by reference to the elementary works, that the words 'usage,' 'custom,' 'course of trade,' are used interchangeably." And see *Bishop Written Laws*, § 150.

⁵ *Porter v. Hills*, 114 Mass. 106; *Ober v. Carson*, 62 Misso. 209; *Wilson v. Bauman*, 80 Ill. 493; *Ocean Beach Assoc. v. Brinley*, 7 Stew. Ch. 438; *Townsend v. Whitby*, 5 Harring. Del. 55.

⁶ *Munn v. Burch*, 25 Ill. 35, 38.

⁷ *Wrotesley v. Adams*, 1 Plow. 187, 195; *Jones v. Thurlow*, 8 Mod. 172; *Williams v. Williams*, Carth. 269; *Columbia Bank v. Fitzhugh*, 1 Har. & G. 239; *Branch v. Burnley*, 1 Call, 147, 159; *Cook v. Renick*, 19 Ill. 598. See *Watt v. Hoch*, 1 Casey, Pa. 411; *Commonwealth v. Mayloy*, 7 Smith, Pa. 291.

law is, that the former is restricted to a particular locality, or class of persons, or business, while the latter is universal throughout the State.¹ What pertains to a city or neighborhood only, and is general there, is in effect law in such place,² yet it is not taken judicial cognizance of by the courts, so it must be proved, and it retains the name of custom.³

§ 447. **Usage between Parties.** — A usage between the parties to a contract, not extending to any particular locality or business, or to other persons, is the most limited sort of usage which we are here to consider.⁴ Hence —

§ 448. **Varieties.** — The sorts of usage are varying. Still, in their effects on a contract, they depend on common principles. We shall see more of them in the next sub-title.

III. *The Effect of Custom or Usage in a Contract.*

§ 449. **Defined.** — The doctrine of this sub-title is that, if, when and where a contract is made, there is a custom or usage applicable to it and known to both the parties, either in fact, or presumptively from its long continuance, notorious character, or otherwise, — if it is not in conflict with the law or its policy, — if it is reasonable, and, as to the place, business, or persons, uniform and universal, — it will be accepted, like the general law, not in contradiction of written stipulations, but as explaining what is indistinct in them, and furnishing the rule where they are silent.⁵ There are illustrations of this doctrine in the last chapter. Further to particularize, —

¹ 3 Salk. 112; *Millar v. Taylor*, 4 Bur. 2303, 2395.

² *Commonwealth v. Mayloy*, 7 Smith, Pa. 291.

³ 1 Saund. Pl. & Ev. 3d Am. ed. 399; *Scales v. Key*, 11 A. & E. 819; *Griffin v. Blandford*, Cowp. 62; *Parkin v. Radcliffe*, 1 B. & P. 282; *Winton v. Wilks*, 2 Ld. Raym. 1129, 1134, 1135; *Kingsmill v. Bull*, 9 East, 185; *Leuckart v. Cooper*, 7 Car. & P. 119. But see *Watt v. Hoch*, 1 Casey, Pa. 411.

⁴ *Norris v. Fowler*, 87 N. C. 9; *Thompson v. Matthews*, 56 Missis. 368.

⁵ *Macomber v. Parker*, 13 Pick. 175, 182; *Columbia Bank v. Fitzhugh*, 1 Har. & G. 239; *Walsh v. Mississippi Valley Transp. Co.* 52 Misso. 434; *Southwestern Freight, &c. Co. v. Standard*, 44 Misso. 71; *Chenery v. Goodrich*, 106 Mass. 566; *Haskins v. Warren*, 115 Mass. 514; *Mears v. Waples*, 4 Houst. 62; *Butterworth v. Volkening*, 4 Thomp. & C. 650; *McMasters v. Pennsylvania Railroad*, 19 Smith, Pa. 374; *Appleman v. Fisher*, 34 Md. 540; *Luce v. Dorchester Mutual Fire Ins. Co.* 105 Mass. 297; *Sullivan v. Thompson*,

§ 450. **Proved.** — The party relying on a custom or usage must prove it to the jury, like any other fact.¹ And —

§ 451. **Known.** — He must show, either by direct evidence or by presumption, that it was known to the other party.² But if, for example, it relates to a particular trade, it is presumed to have been known to all persons engaged therein.³

§ 452. **Uniform and Universal** — (**Definite, Distinct**). — It must be uniform and, within its proper limits, which are sometimes very narrow, universal.⁴ And it must be definite and distinct.⁵

§ 453. **Not Contrary to Law** — It is not competent for a custom or usage, of the sort contemplated in this chapter, to change the law; or, in other words, to establish a rule contrary thereto,⁶ — a proposition which the reader should be careful not to misconstrue. Again, —

99 Mass. 259; *Boardman v. Spooner*, 13 Allen, 353; *Eaton v. Smith*, 20 Pick. 150, 156; *Hursh v. North*, 4 Wright, Pa. 241; *Thomas v. Graves*, 1 Mill, 308; *Dixon v. Dunham*, 14 Ill. 324; *Leach v. Beardslee*, 22 Conn. 404; *Shaw v. Mitchell*, 2 Met. 65; *Cooper v. Kane*, 19 Wend. 386; *Holford v. Adams*, 2 Duer, 471; *Dodd v. Farlow*, 11 Allen, 426; *Tremble v. Crowell*, 17 Mich. 493; *Strong v. Grand Trunk Railroad*, 15 Mich. 206; *Hinton v. Locke*, 5 Hill, N. Y. 437; *Jordan v. Meredith*, 3 Yeates, 318; *Alabama, &c. Railroad v. Kidd*, 29 Ala. 221; *Burton v. Blin*, 23 Vt. 151; *Chapman v. Devereux*, 32 Vt. 616; *Knox v. Artman*, 3 Rich. 283; *Holmes v. Johnson*, 6 Wright, Pa. 159; *Greene v. Tyler*, 3 Wright, Pa. 361; *Cadwell v. Meek*, 17 Ill. 220; *Renner v. Columbia Bank*, 9 Wheat. 581; *Perkins v. Jordan*, 35 Maine, 23; *Van Ness v. Pacard*, 2 Pet. 137, 148; *Gordon v. Little*, 8 S. & R. 533; *Lee v. Kilburn*, 3 Gray, 594; *Soutier v. Kellerman*, 18 Misso. 509; *Munn v. Burch*, 25 Ill. 35; *Power v. Kane*, 5 Wis. 265; *Rindskoff v. Barrett*, 14 Iowa, 101; *Sanderson v. Columbian Ins. Co.* 2 Cranch C. C. 218.

¹ Ante, § 446; 2 Greenl. Ev. § 251, 252; *Hall v. Benson*, 7 Car. & P. 711;

The Sultan v. Three Thousand Empty Oil Barrels, 15 Fed. Rep. 618; *Marye v. Strouse*, 6 Saw. 204; *Jones v. Hoey*, 128 Mass. 585, 587; *Willcuts v. Northwestern Mut. Life Ins. Co.* 81 Ind. 300; *Girard Life Ins. &c. Co. v. Mutual Life Ins. Co.* 13 Philad. 90.

² *Sawtelle v. Drew*, 122 Mass. 228; *Boardman v. Gaillard*, 3 Thomp. & C. 695, 1 Hun, 217; *The Innocenta*, 10 Ben. 410; *Randall v. Smith*, 63 Maine, 105; *Central Railroad v. Anderson*, 58 Ga. 393; *Murray v. Brooks*, 41 Iowa, 45; *Janney v. Boyd*, 30 Minn. 319; *Taylor v. Mueller*, 30 Minn. 343; *Marshall v. Perry*, 67 Maine, 78.

³ *Carter v. Philadelphia Coal Co.* 27 Smith, Pa. 286. And see ante, § 444.

⁴ *Scudder v. Bradbury*, 106 Mass. 422; *Porter v. Hills*, 114 Mass. 106; *Ober v. Carson*, 62 Misso. 209; *Madden v. Blain*, 66 Ga. 49; *Commonwealth v. Mayloy*, 7 Smith, Pa. 291; *Wood v. Hickok*, 2 Wend. 501, 504; *Branch v. Palmer*, 65 Ga. 210.

⁵ *Sawtelle v. Drew*, 122 Mass. 228; *Paine v. Howells*, 90 N. Y. 660.

⁶ *Bishop Written Laws*, § 150; *Dickinson v. Gay*, 7 Allen, 29; *Hedden v. Roberts*, 134 Mass. 38; *Marshall v. Perry*, 67 Maine, 78; *Randall v. Smith*,

§ 454. **Or Terms of Contract.** — It cannot subvert unambiguous terms in a contract, or give it a rendering antagonistic to its words.¹ If, for example, the undertaking is to build a mahogany counter, no custom can render sufficient a structure in part of stained white-wood.² Nor will custom convert into fulfilment the delivery of a mixture of Early Rose and other varieties of potatoes on a contract to supply Early Rose.³

§ 455. **Not Unreasonable.** — An unreasonable custom, or one subversive of justice, or the like, is void.⁴

§ 456. **Effect on Contract.** — When a custom, such as is thus explained, is shown to have existed at the time of the making of a contract, it is, in the absence of any indication to the contrary, to be construed as though the terms of the custom were written into it, constituting of it a part.⁵ For example, one employed to do a particular thing, with nothing said of payment, may recover for his services whatever he can show to be customary.⁶

§ 457. **Usage Limited to the Parties.** — The foregoing rules apply, not only to the more general usages, but to a course of dealings simply between the parties; the new transaction is *prima facie* presumed to be on the same basis as the former ones.⁷ So, —

63 Maine, 105; *Winder v. Blake*, 4 Jones, N. C. 332; *Bailey v. Hope Ins. Co.* 56 Maine, 474; *McCrary v. McFarland*, 93 Ind. 466.

¹ *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Mulliner v. Bronson*, 14 Bradw. 355; *Stebbins v. Brown*, 65 Barb. 274; *Marks v. Cass County Mill, &c. Co.* 43 Iowa, 146; *Larkin v. Mitchell, &c. Lumber Co.* 42 Mich. 296; *Gibney v. Curtis*, 61 Md. 192, 201, where it is observed: "Usage may be admissible to explain what is doubtful, but never to contradict what is plain."

² *Greenstine v. Borchard*, 50 Mich. 434. See *Bixby v. Wilkinson*, 25 Minn. 481.

³ *Woods v. Miller*, 55 Iowa, 168, 172.

⁴ *Wilkes v. Broadbent*, 1 Wils. 63, 2 Stra. 1224; *Rogers v. Brenton*, 10 Q. B.

26; *Taylor v. Devey*, 7 A. & E. 409; *Nolte v. Hill*, 36 Ohio State, 186; *Freary v. Cooke*, 14 Mass. 488.

⁵ *Sawtelle v. Drew*, 122 Mass. 228; *Doane v. Dunham*, 79 Ill. 131; *Ocean S. S. Co. v. McAlpin*, 69 Ga. 437; *Florence Machine Co. v. Daggett*, 135 Mass. 582; *Castleman v. Southern Mut. Life Ins. Co.* 14 Bush, 197; *Lacy v. Green*, 3 Norris, Pa. 514; *Walker v. Armstrong*, 54 Texas, 609; *Mand v. Trail*, 92 Ind. 521; *Henkel v. Welsh*, 41 Mich. 664.

⁶ *Thompson v. Boyle*, 4 Norris, Pa. 477; *Reg. v. Doutre*, 9 Ap. Cas. 745; *Lyon v. George*, 44 Md. 295.

⁷ *Hall v. Steel*, 68 Ill. 231; *Dillard v. Paton*, 19 Fed. Rep. 619; *Whitworth v. Erie Railway*, 87 N. Y. 413; *Thompson v. Matthews*, 56 Missis. 368.

§ 458. **Usage of One Party.** — Even if one party only, conducting a particular business, has a uniform usage therein, it may be presumed to have entered into a contract with another who knew it; but such knowledge must appear, either from direct testimony or from adequate notoriety.¹ The usage, like any other, must be reasonable.²

§ 459. **In General.** — The illustrations of the foregoing doctrines are limitless; the reader can find them in the cases cited in the notes, or by consulting the digests. It is believed that a fuller exposition here would be less profitable to him than to reserve our space for other topics.

§ 460. *The Doctrine of this Chapter restated.*

Law is the atmosphere of associated life, without which it cannot exist. It surrounds and pervades all, furnishing the rule for all transactions. Where parties wish to be governed by a different or additional rule, or to render that of the law distinct and certain, they enter into a contract. And it is permissible for them, though with limitations and restrictions, thus to vary or render more distinct the rule of the law. Still as to particulars on which they are silent, the law's rule prevails; and, where they speak, it mingles with their language, qualifying, contracting, and expanding it by its interpretations. This consequence they are presumed to intend. Also a usage, or custom, is a law of the particular place or business. Hence, in forming a contract, the parties become by implication bound by it, the same as by the general law. Yet no custom, usage, or other law will overturn an express stipulation of a sort which the courts hold to be valid. Should the law allow this, it would contradict itself.

¹ *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; *Mobile, &c. Railway v. Jay*, 61 Ala. 247; *Murray v. Brooks*, 41 Iowa, 45; *Norris v. Fowler*, 87 N. C. 9; *Central Railroad, &c. Co. v. Anderson*, 58 Ga. 393; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Steel Works v. Dewey*, 37 Ohio State, 242.

² *St. Mary's Beneficial Soc. v. Burford*, 20 Smith, Pa. 321.

CHAPTER XVII.

LAW AND FACT AS TO THE PARTIES' KNOWLEDGE OR
IGNORANCE THEREOF.

§ 461. **Elsewhere — Here.** — In another chapter, we shall consider the effect upon the contract of Mistake.¹ And the question will present itself incidentally in still other connections. The purpose of this chapter is simply to bring to view, as helpful in all the elucidations of our subject, a few of the more general principles.

§ 462. **Presumption that Law is Known.** — The law is administered, and necessarily so, on the presumption which, except in special circumstances, is conclusive, that it is known by every person who dwells or transacts business in the country where it prevails.² This rule, by its terms, does not conclude all persons to know a foreign law.³ The exceptions are principally such as have no relation to contracts; for example (a proposition on its face singular), it appears that a judicial person, who, one would think, should know the law if anybody does, will be held blameless though he honestly mistakes it.⁴ Hence, —

¹ Post, § 693 et seq.

² 1 Bishop Crim. Law, § 294; 2 Kent. Com. 491; 1 Story Eq. § 111; Cooper v. Phibbs, Law Rep. 2 H. L. 149, 170; Weed v. Weed, 94 N. Y. 243, 247; Bilbie v. Lumley, 2 East, 469, 472; Midland, &c. Railway v. Johnson, 6 H. L. Cas. 798, 4 Jur. n. s. 643; Stevens v. Lynch, 12 East, 38.

³ Stedman v. Davis, 93 N. Y. 32.

⁴ 1 Bishop Crim. Law, § 299, 460, 462; 2 Ib. § 977. See Long v. Long, 57 Iowa, 497. The doctrine of this section is in some views of it quite gro-

tesque. "As to the certainty of the law," said Lord Mansfield, "it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is, that it is so uncertain that it costs much money to know what it is, even in the last resort." Jones v. Randall, Cowp. 37, 40. The only apology for this doctrine is its necessity. And this apology is ample. If, in every case, it was open to inquiry whether or not the parties knew the law, justice could not be administered.

§ 463. **Nature of Mistake** — (**Law or Fact**). — The only sort of mistake which, except as intimated in the last section, is taken cognizance of in our jurisprudence, is mistake of fact. The proposition that every one is conclusively presumed to know the law is but another form of saying that, in legal contemplation, there is and can be no such thing as mistake of law.

§ 464. **Effect**. — Mistake, therefore, is not a principle of the law. It is a fact; and it exists in some cases, in others not. Like any other fact, its effect depends upon its combination with associated facts, and upon the principles of law which the entire case calls into action.

§ 465. **Defined and Explained**. — A mistake which may have effect in the law is any misapprehension of a relevant fact. There is in the books a good deal of confusion, and to some extent the decisions are contradictory, as to the consequence of the mistake having been produced by what is in legal contemplation impossible, ignorance of the law, and as to what is to be deemed fact in distinction from law. It seems pretty plainly to be a question of fact whether A or B owns a given article of personal property;¹ so that, if, for example, one mistakenly deeming a thing to be his appropriates it, he does not commit larceny of the thing, though all the particulars relating to the title are known to him, and his mistake results from his misapplying the law.² And, in general terms, it is a question of fact whether or not an individual is invested with any form of right in a thing, or a contract, or interpretation of a contract; a fact being not less a fact though it is the offspring of the law. Such seems to be the conclusion alike of reason and of the somewhat conflicting decisions; or, at least, the better decisions.³ And there is

¹ "Private right of ownership is a matter of fact." Lord Westbury in *Cooper v. Phibbs*, Law Rep. 2 H. L. 149, 170.

² 1 Bishop Crim. Law, § 297.

³ Consult and compare, for example, *Beauchamp v. Winn*, Law Rep. 6 H. L. 223, 234; *Wiggin v. Wiggin*, 58 N. H. 235; *Anderson v. Soward*, 40 Ohio State,

325; *Hutton v. Edgerton*, 6 S. C. 485; *Ring v. Jamison*, 2 Misso. Ap. 584; *Baddley v. Oliver*, 1 Dowl. P. C. 598, 604; *Wilson v. Maryland Life Ins. Co.* 60 Md. 150; *Louisville v. Anderson*, 79 Ky. 334; *Hawkins v. Brown*, 80 Ky. 186; *Sparks v. Pittman*, 51 Missis. 511; *Toops v. Snyder*, 70 Ind. 554. See post, § 704, 705.

no objection to calling that a mistake of fact which is mingled with, or was produced by, ignorance of the law.¹

§ 466. *The Doctrine of this Chapter restated.*

The necessities of litigation compel the courts to assume conclusively, that a party is fully and absolutely cognizant of all the doctrines of the law, even those which it has the utmost difficulty in itself determining. But whether he knew a fact or not is a question open to inquiry. Therefore a mistake of law is, in legal contemplation, ordinarily impossible. A mistake of fact is otherwise; but its effect will depend upon the accompanying facts of the case, and upon the rules of law applicable thereto. Mistake, therefore, cannot properly be deemed a separate branch of our jurisprudence.

¹ 1 Bishop Crim. Law, § 311.

CHAPTER XVIII.

CONTRACTS ILLEGAL OR OF EVIL TENDENCY.

- § 467, 468. Introduction.
- 469-490. General Doctrine.
- 491-497. In Obstruction of Judicial Justice.
- 498-504. In Obstruction of Governmental Order.
- 505-512. Violative of Good Morals.
- 513-520. In Restraint of Trade.
- 521-528. Partaking of Unlawful Conspiracy.
- 529-535. Gaming Contracts.
- 536-546. Violative of Lord's Day.
- 547, 548. Contrary to Statutes regulating Business.
- 549. Doctrine of Chapter restated.

§ 467. **Here — Elsewhere.** — The contracts of this chapter are those commonly described in the books as illegal, immoral, or contrary to the policy of the law, or to public policy. The law disallows them because of their illegality or their evil tendency. In another chapter, we saw that only in the channels of the law can the stipulations of parties be made to flow;¹ and in another, that a consideration violative of the law or of sound policy is inadequate.² In respect of particular contracts, the subject of this chapter will present itself in various other connections.

§ 468. **How Chapter divided.** — We shall consider, I. The General Doctrine; II. Contracts in Obstruction of Judicial Justice; III. Contracts in Obstruction of Governmental Order; IV. Contracts violative of Good Morals; V. Contracts in Restraint of Trade; VI. Contracts partaking of Unlawful Conspiracy; VII. Gaming Contracts; VIII. Contracts violative of the Lord's Day; IX. Contracts contrary to the Statutes in Regulation of Business.

¹ Ante, § 442, 443; post, § 474. .

² Ante, § 59.

I. *The General Doctrine.*

§ 469. **Indirect Means.**—The law will not suffer the accomplishment, by indirect means, of what it forbids directly.¹ Hence,—

§ 470. **Doctrine defined.**—No agreement between parties to do a thing prohibited by law, or subversive of any public interest which the law cherishes, will be judicially enforced. To explain,—

§ 471. **Directly forbidden.**—Any act which is forbidden either by the common or the statutory law—whether it is *malum in se*, or merely *malum prohibitum*;² indictable,³ or only subject to a penalty or forfeiture;⁴ or however otherwise prohibited by a statute,⁵ or the common law⁶—cannot be the foundation of a valid contract; nor can anything auxiliary to, or promotive of, such act.⁷ And this doctrine is the same in the equity tribunals as in those of law.⁸ Thus,—

§ 472. **Illustrations.**—Wages earned by a minor forbidden

¹ Booth v. Bank of England, 7 Cl. & F. 509, 540; In re Macleay, Law Rep. 20 Eq. 186, 189; Wells v. People, 71 Ill. 532.

² Cannan v. Bryce, 3 B. & Ald. 179, 183, 184; White v. Buss, 3 Cush. 448, 450.

³ Poplett v. Stockdale, Ryan & Moody, N. P. 337; Fores v. Johnes, 4 Esp. 97; Gale v. Leckie, 2 Stark. 107.

⁴ Bartlett v. Vinor, Carth. 251; Fergusson v. Norman, 5 Bing. N. C. 76, 3 Jur. 10.

⁵ Peck v. Burr, 6 Selden, 294; Hathaway v. Moran, 44 Maine, 67; Lord v. Chadbourne, 42 Maine, 429; Cook v. Phillips, 56 N. Y. 310; Gaslight, &c. Co. v. Turner, 8 Scott, 609, 6 Bing. N. C. 324; Yeates v. Williams, 5 Pike, 684; Bemis v. Becker, 1 Kan. 226; Dillon v. Allen, 46 Iowa, 299.

⁶ Carpenter v. Beer, Comb. 246; Cope v. Rowlands, 2 M. & W. 149, 2 Gale, 231.

⁷ Stanley v. Nelson, 28 Ala. 514; Milton v. Haden, 32 Ala. 30; Madison

Ins. Co. v. Forsythe, 2 Ind. 483; Siter v. Sheets, 7 Ind. 132; Ellsworth v. Mitchell, 31 Maine, 247; Hall v. Mullin, 5 Har. & J. 190, 193; Bayley v. Taber, 5 Mass. 286; Wheeler v. Russell, 17 Mass. 258; Farrar v. Barton, 5 Mass. 395; Roby v. West, 4 N. H. 285; Nourse v. Pope, 13 Allen, 87; Solomon v. Dreschler, 4 Minn. 278; Downing v. Ringer, 7 Misso. 585; Carleton v. Whitcher, 5 N. H. 196; Brackett v. Hoyt, 9 Fost. N. H. 264; Bell v. Quin, 2 Sandf. 146; Seidenbender v. Charles, 4 S. & R. 151; Mitchell v. Smith, 1 Binn. 110, 118; Maybin v. Coulon, 4 Dall. 298; Biddis v. James, 6 Binn. 321; Hale v. Henderson, 4 Humph. 199; Elkins v. Parkhurst, 17 Vt. 105; Spalding v. Preston, 21 Vt. 9; Territt v. Bartlett, 21 Vt. 184; Rutland Bank v. Parsons, 21 Vt. 199; Bancroft v. Dumas, 21 Vt. 456; Armstrong v. Toler, 11 Wheat. 258; Cummings v. Saux, 30 La. An. 207.

⁸ Ante, § 427; In re Cork, &c. Railway, Law Rep. 4 Ch. Ap. 748, 762; Sykes v. Beadon, 11 Ch. D. 170.

by a statute to be employed in the particular business,¹ or by a school-teacher not having the certificate of qualifications which a statute provides for,² or by a broker for services rendered without the license ordained by a statute,³ or by any one in unlicensed peddling,⁴ the price agreed to be paid for goods sold contrary to a revenue law,⁵ or for a fertilizer sold without the inspection which a statute directs,⁶ or for anything knowingly furnished to a public enemy or in aid of a rebellion,⁷ or sold for any other use which the law forbids,⁸—none of these and no other thing promised for what is done or given to violate any regulation of law⁹ can be effectually sued for in a judicial tribunal.

§ 473. **Against Public Policy.**—A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibited by a statute, termed a contract against public policy (or sound policy), is likewise void.¹⁰ Akin to public policy, if not identical with it, is the —

§ 474. **Policy of the Law.**—This term is sometimes employed in the same sense as public policy, and perhaps the distinction between the two is not well established. It is

¹ *Birkett v. Chatterton*, 13 R. I. 299.

² *Ryan v. Dakota School Dist.* 27 Minn. 433; *Wells v. People*, 71 Ill. 532.

³ *Cope v. Rowlands*, 2 M. & W. 149.

⁴ *Stewartson v. Lothrop*, 12 Gray, 52.

⁵ *Curran v. Downs*, 3 Misso. Ap. 468; *McConnell v. Kitchens*, 20 S. C. 430; *Deans v. McLendon*, 30 Missis. 343. See *Wetherell v. Jones*, 3 B. & Ad. 221; *Brown v. Duncan*, 10 B. & C. 93.

⁶ *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Woods v. Armstrong*, 54 Ala. 150; *Johnston v. McConnell*, 65 Ga. 129. But see *Niemeyer v. Wright*, 75 Va. 239.

⁷ *Hanauer v. Doane*, 12 Wal. 342, 347; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Oxford Iron Co. v. Spradley*, 51 Ala. 171, 175; *Lewis v. Latham*, 74 N. C. 283.

⁸ *Lightfoot v. Tenant*, 1 B. & P. 551, 556; *Swanger v. Mayberry*, 59 Cal. 9.

⁹ *Kerr v. Birnie*, 25 Ark. 225; *Thorne v. Travellers Ins. Co.* 30 Smith, Pa. 15; *Webb v. Brooke*, 3 Taunt. 6; *Simpson v. Bloss*, 7 Taunt. 246; *De Groot v. Van Duzer*, 17 Wend. 170; *Arnot v. Pittston, &c. Coal Co.* 68 N. Y. 558; *Capehart v. Rankin*, 3 W. Va. 571; *Stevens v. Perrier*, 12 Kan. 297; *Lill v. Brant*, 6 Bradw. 366. See, as to limitations of the doctrine, *Warren v. Manufacturers Ins. Co.* 13 Pick. 518, 521, 522; *Peterson v. Christensen*, 26 Minn. 377.

¹⁰ 2 Kent Com. 466; Met. Con. 229; *Pollock Con.* 251; *Jones v. Randall*, Cowp. 37, 39; *Printing, &c. Co. v. Sampson*, Law Rep. 19 Eq. 462; *Martin v. Bartow Iron Works*, 35 Ga. 320, 329; *Guenther v. Dewien*, 11 Iowa, 133; *Reynolds v. Nichols*, 12 Iowa, 398; *Odineal v. Barry*, 24 Missis. 9; *Ray v. Mackin*, 100 Ill. 246; *Peterson v. Christensen*, 26 Minn. 377.

here used to indicate what has already been spoken of,¹ that only in the law's channels can rights, whether of person or of property, be made to flow. Parties cannot by their contracts create new channels. For example, —

§ 475. **Conveyances to Husband and Wife.**— Under the common law, a husband and his wife cannot, by any form of contract, or by any other means, become tenants by entireties of personal property; neither, by respectable opinions, not universally accepted, can real estate be so conveyed to them as to render their tenancy therein either joint or in common, but when the attempt is made the law will declare them to be tenants by entireties.²

§ 476. **Tendency to Unlawful — (Lawful on Face).**— The mere tendency of a contract to promote unlawful acts renders it illegal as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts.³ For example, it tends to fraud for the officers of a corporation to speculate on claims against it; therefore a contract, by such officers, for the purchase of a claim against the corporation cannot be enforced.⁴ And though on the face of a contract nothing unlawful appears, if the parties meant thereby to accomplish an unlawful object, it will be invalid.⁵ *A fortiori*, —

§ 477. **Directly promoting Unlawful.**— To enforce a contract in direct subversion or evasion of any regulation which the law has made for the general good would be against sound policy. So that, where persons by mutual agreement bought a ship to be registered in a way to elude the provisions of the registry acts, the equity tribunal refused to compel an accounting between them.⁶

§ 478. **Unjust.**— A contract may appear, when viewed in all its circumstances, so unjust and oppressive that its enforcement⁷ will be deemed forbidden by public policy.

¹ Ante, § 442, 443, 467.

393. And see *Love v. Brindle*, 7 Jones, N. C. 560.

² 1 Bishop Mar. Women, § 211, 616—619.

⁵ *Riley v. Jordan*, 122 Mass. 231, 233.

³ *Egerton v. Brownlow*, 4 H. L. Cas.

⁶ *Battersby v. Smyth*, 3 Madd. 110.

1, 18 Jur. 71.

⁷ *Jestons v. Brooke*, Cowp. 793;

⁴ *McDonald v. Haughton*, 70 N. C. *Plumbe v. Carter*, Cowp. 116, in note.

Therefore where a sea-captain, on an outward-bound voyage, took from his men their bond to demand no wages until the arrival of the vessel at the home port, this bond, on the vessel being lost, was adjudged to be no impediment to the recovery of their wages.¹ But one's obligation to remove with his family from a particular parish, and not to renew his inhabitancy there without the consent of the obligee has been held to be good. So a man "may restrain himself from buying an estate in such a place, or aliening to such a person."²

§ 479. **Repeal, Renewal, of Statute.** — The repeal of a statute does not operate retrospectively; so that a contract which was void as conflicting with it, is not thereby made good, it remains void.³ Nor will a subsequent promise impart validity to such a contract, for it is without consideration;⁴ nor will a new statute, since it also has no retrospective force.⁵

§ 480. **Statute subsequent to Valid Contract.** — Statutes often, and properly, make unlawful what was lawful before.⁶ If, then, by a statute of this sort, the fulfilment of what was a valid agreement is rendered illegal, things already done under it remain valid.⁷

§ 481. **Mistake of Fact and Law — (Evil Intent).** — The contract now under consideration is within the rules of the criminal law as to the intent.⁸ Thus, recurring also to the doctrine of the last chapter, if one intentionally does a thing

¹ *Buck v. Rawlinson*, 1 Bro. P. C. 137. And see *Miller v. Cook*, Law Rep. 10 Eq. 641. Some of the cases state this doctrine as pertaining rather to the equity than to the law tribunals. In most of our States law and equity are so intermingled as to render the distinction unimportant. But aside from this, it would be difficult to find any just ground for excluding it from a court of law. See post, § 737.

² *Shelton v. Sire*, 11 Mod. 310.

³ *Gilliland v. Phillips*, 1 S. C. 152; *Robinson v. Barrows*, 48 Maine, 186; *Bancher v. Mansel*, 47 Maine, 58; *Milne v. Huber*, 3 McLean, 212; *Jaques v. Withy*, 1 H. Bl. 65; *Decell v. Lewen-*

thal, 57 Missis. 331; *Anding v. Levy*, 57 Missis. 51; *Webber v. Howe*, 36 Mich. 150.

⁴ *Ludlow v. Hardy*, 38 Mich. 690; *Dever v. Corcoran*, 3 Allen, N. B. 338, referred to in *Robinson v. Barrows*, supra, at p. 189. Contra, *Carr v. Louisiana Nat. Bank*, 29 La. An. 258. Compare with ante, § 88-100.

⁵ *Mays v. Williams*, 27 Ala. 267.

⁶ *Bishop Stat. Crimes*, § 957, 992 a, 1001; post, § 564, 594.

⁷ *Bennett v. Woolfolk*, 15 Ga. 213; *Bradford v. Jenkins*, 41 Missis. 328. And see *Tucker v. Stokes*, 3 Sm. & M. 124.

⁸ Ante, § 216, note.

which the law declares to be criminal, he commits the offence though not aware of the inhibition;¹ so, to render a contract void as against public policy, the parties need not understand that the law gives it this character.² On the other hand, as, in the criminal law, the doing of an outwardly indictable act through an innocent mistake of the facts is not a crime;³ so, in the law of contracts, an agreement will not be held void as against public policy if honestly entered into in ignorance of the invalidating facts.⁴ And this doctrine may apply either to both parties or to one.⁵ To illustrate, —

§ 482. **Services in Ignorance.** — A father who lets his minor son to service may recover compensation though, unknown to him, the son has been employed in selling liquor contrary to a statute⁶ which rendered the sales indictable.⁷ And if an actor who plays in an unlicensed theatrical exhibition does not know that there is no license, he may compel payment for his services.⁸ On this principle, —

§ 483. **Indemnity to Officer Serving Process.** — When an officer is called upon to arrest one or attach his goods, and there is doubt as to the identity of the person or the ownership of the goods, he may demand a bond of indemnity;⁹ then, though the seizure proves to be unlawful, the bond is valid if the parties acted in good faith, not knowing the real facts; otherwise it is invalid.¹⁰ And —

§ 484. **Indemnity to Private Person.** — An indemnity to a private person, who assists in taking property under a claim of right, is likewise valid, when the act is in good faith, though it turns out to be a trespass.¹¹

¹ 1 Bishop Crim. Law, § 294, 300, 309.

² *Saratoga County Bank v. King*, 44 N. Y. 87, 92.

³ 1 Bishop Crim. Law, § 301, 303, 303 a, note.

⁴ *Quirk v. Thomas*, 6 Mich. 76.

⁵ Post, § 489; *Wright v. Crabbs*, 78 Ind. 487; *Hanauer v. Doane*, 12 Wal. 342; *Michael v. Bacon*, 49 Misso. 474; *Distilled Spirits*, 11 Wal. 356; *Suit v. Woodhall*, 113 Mass. 391; ante, § 216.

⁶ Ante, § 472.

⁷ *Emery v. Kempton*, 2 Gray, 257.

⁸ *Roys v. Johnson*, 7 Gray, 162.

⁹ *Drake Attach.* § 189.

¹⁰ *Marsh v. Gold*, 2 Pick. 285; *Anderson v. Farns*, 7 Blackf. 343; *Lamp-ton v. Taylor*, 5 Litt. 273; *Davis v. Tibbats*, 7 J. J. Mar. 264; *Stark v. Raney*, 18 Cal. 622; *McCartney v. Shepard*, 21 Misso. 573; *Ives v. Jones*, 3 Ire. 538.

¹¹ *Avery v. Halsey*, 14 Pick. 174; *Stone v. Hooker*, 9 Cow. 154. And see *McLauren v. Graham*, 26 Missis. 400.

§ 485. **Indemnity for Neglect of Duty.** — An undertaking to indemnify an officer for neglecting his duty is, within the principle under consideration, void.¹ But —

§ 486. **Taking Security.** — It is not a neglect in him, when making an attachment, to take security for the debt; so that a note given him on consideration of his releasing or forbearing an attachment is good.²

§ 487. **In Part Illegal.** — A contract illegal in part and legal as to the residue is void as to all, when the parts cannot be separated; when they can be, the good will stand and the rest fall. One entire consideration cannot, within this rule, be separated, though composed of distinct items, some of which are legal and others illegal.³ To illustrate: where one uninterrupted service consists chiefly of what is lawful, yet in small part of acts done in an unlawful business, nothing can be recovered for it.⁴ But if a promissory note is given in part payment of a running account, containing illegal items, yet if it is not in excess of the good ones, it will be valid; because “the law would appropriate the payment to the lawful items,” and the payee could not have applied it to the unlawful.⁵ Where a mortgage is given to secure two promissory notes, the one of which is valid and the other illegal, it can be enforced as to the good one.⁶ If a statute prohibits an officer from claiming a reward for the detection of a crime, one who comes to the aid of the officer, but does not independently do what would entitle him to the reward,

¹ *Hodsdon v. Wilkins*, 7 Greenl. 113; *Ayer v. Hutchins*, 4 Mass. 370; *Churchill v. Perkins*, 5 Mass. 541.

² *Foster v. Clark*, 19 Pick. 329; *Shotwell v. Hamblin*, 23 Missis. 156; *Randle v. Harris*, 6 Yerg. 508. See *Webbers v. Blunt*, 19 Wend. 188; *Winter v. Kinney*, 1 Comst. 365; *Hunter v. Agee*, 5 Humph. 57; *Prewitt v. Garrett*, 6 Ala. 128.

³ *Yale v. Rex*, 6 Bro. P. C. 27, 31; *Kimbrough v. Lane*, 11 Bush, 556; *Saratoga County Bank v. King*, 44 N. Y. 87; *Chandler v. Johnson*, 39 Ga. 85; *Braith v. Guelick*, 37 Iowa, 212; *Bixby v. Moor*, 51 N. H. 402; *Fackler v. Ford*,

McCahon, 21; *Hanauer v. Gray*, 25 Ark. 350; *Widoe v. Webb*, 20 Ohio State, 431; *Jones's Case*, 1 Leon. 203; *Mason v. Watkins*, 2 Vent. 109; *Valentine v. Stewart*, 15 Cal. 387; *Dean v. Emerson*, 102 Mass. 480; *More v. Bonnet*, 40 Cal. 251; *Newberry Bank v. Stegall*, 41 Missis. 142; *Robinson v. Bland*, 2 Bur. 1077, 1082; *Pullerton v. Agnew*, 1 Salk. 172, Holt, 148; *Marle v. Flake*, Holt, 122.

⁴ *Bixby v. Moor*, *supra*.

⁵ *Warren v. Chapman*, 105 Mass. 87, 89.

⁶ *Carradine v. Wilson*, 61 Missis. 573.

can have nothing.¹ Still where in any way there is a complete right outside of what is illegal, it may be enforced.²

§ 488. **Unlawful upon Unlawful.** — A contract executed in consideration of a previous illegal one,³ or in compromise of differences growing out of it,⁴ is, like that whereon it rests, illegal, and incapable of being enforced.

§ 489. **Mutual Relations of Parties.** — The law denies redress to a person who has suffered from another's fault, if himself to blame in the same thing.⁵ And one sued may set up this defence, though in pleading it he necessarily alleges, what in most other classes of cases he cannot do, his own wrong.⁶ Whichever party, therefore, brings a suit on a contract of the sort we are considering in this chapter, the other may ordinarily defend it on the ground that it violates the public policy or the law.⁷ This rule is sometimes relaxed, particularly in courts of equity, and even in courts of law, in favor of a party deemed less guilty or more excusable than the other, by permitting him to maintain his suit in circumstances where the public interests will, in the judicial opinion, be thereby advanced.⁸ If the illegal contract has been carried into execution so as to vest interests or property in the one party or the other, neither will be granted by the tribunal what is termed equitable relief;⁹ but they may lawfully adjust their respective claims, divide their property, or the like, or the court will enforce partition.¹⁰ Moreover, they may at any time recede from their illegal contract, and place them-

¹ *Dunham v. Stockbridge*, 133 Mass. 233.

² *Ware v. Curry*, 67 Ala. 274.

³ *Cate v. Blair*, 6 Coldw. 639; *Pierce v. Kibbee*, 51 Vt. 559; *King v. Winants*, 71 N. C. 469, 73 N. C. 563.

⁴ *Everingham v. Meighan*, 55 Wis. 354; *Wilson v. Bozeman*, 48 Ala. 71.

⁵ 2 Bishop Mar. & Div. § 75.

⁶ *Bayley v. Taber*, 5 Mass. 286, 293; *Farrar v. Barton*, 5 Mass. 395, 398.

⁷ *Shaw v. Carlile*, 9 Heisk. 594; *Langford v. Monteith*, 1 Idaho, n. s. 612; *Gunter v. Leckey*, 30 Ala. 591; *Ybarra v. Lorenzana*, 53 Cal. 197; *Holman v.*

Johnson, Cowp. 341, 343; *Horton v. Buffinton*, 105 Mass. 399; *Taylor v. Chester*, Law Rep. 4 Q. B. 309, 314.

⁸ *Osborne v. Williams*, 18 Ves. 379; *Reynell v. Sprye*, 8 Hare, 222, 1 De G. MacN. & G. 660; *Lacaussade v. White*, 7 T. R. 535; *White v. Franklin Bank*, 22 Pick. 181, 186; 2 Chit. Con. 11th Am. ed. 976.

⁹ *McWilliams v. Phillips*, 51 Missis. 196.

¹⁰ *Rhea v. White*, 7 Lea, 628; *DeLeon v. Trevino*, 49 Texas, 88; *Norton v. Blinn*, 39 Ohio State, 145. Compare with *Northrup v. Phillips*, 99 Ill. 449.

selves *in statu quo*.¹ And it is but repeating what has already been laid down² to add, that, where one of the parties is ignorant of the facts which make the contract illegal, he may enforce it against the other who knows them.³

§ 490. **Other Views** — of the general doctrine appear in connection with the particular elucidations of the subsequent sub-titles. These divisions of topics are, like all others made by any author, for practical convenience only; the law itself is seamless.⁴

II. *Contracts in Obstruction of Judicial Justice.*

§ 491. **Doctrine defined.** — The doctrine of this sub-title is, that a contract to do anything, whether indictable or not, tending to obstruct the administration of justice in the courts, is void as against the law or its policy. Thus, —

§ 492. **Compounding.** — Within limits which the author has explained in another work, it is indictable to compound a crime or a penal action.⁵ Therefore⁶ any agreement to do such indictable act is void as against law.⁷ Even, —

§ 493. **Less than Compounding.** — Where the agreement comes short of a technical compounding, but the thing contracted for tends to the same mischief of impeding or discouraging the orderly prosecution of crime, the policy of the law is violated, rendering the contract void.⁸ It is so, for

¹ *Lea v. Cassen*, 61 Ala. 312, 316.

² Ante, § 481, 482.

³ *Wright v. Crabbs*, 78 Ind. 487.

⁴ And see *Jones v. Randall*, Cowp. 37, 39; post, § 640.

⁵ 1 Bishop Crim. Law, § 709-715.

⁶ Ante, § 471.

⁷ *Osbaldeston v. Simpson*, 7 Jur. 734; *Williams v. Bayley*, Law Rep. 1 H. L. 200; *Soule v. Bonney*, 37 Maine, 128; *Commonwealth v. Pease*, 16 Mass. 91; *Bell v. Wood*, 1 Bay, 249; *Mattocks v. Owen*, 5 Vt. 42; *Plumer v. Smith*, 5 N. H. 553; *Cameron v. McFarland*, 2 Law Repos. 415; *Corley v. Williams*, 1 Bailey, 588; *Hinesburgh v. Sumner*, 9 Vt. 23; *State Bank v. Moore*, 2 South-

ard, 470; *Bailey v. Buck*, 11 Vt. 252; *Kimbrough v. Lane*, 11 Bush, 556; *Cain v. Southern Express Co.* 1 Baxter, 315; *Wight v. Rindskopf*, 43 Wis. 344; *Crowder v. Reed*, 80 Ind. 1; *Clubb v. Hutson*, 18 C. B. N. S. 414; *Clark v. Colbert*, 67 Ala. 92; *McMahon v. Smith*, 47 Conn. 221; *In re Mapleback*, 4 Ch. D. 150; *Clark v. Pomeroy*, 4 Allen, 534.

⁸ *Barron v. Tucker*, 53 Vt. 338, 341; *Bills v. Comstock*, 12 Met. 468 (compare with *Stonington v. Powers*, 37 Conn. 439); *Haines v. Lewis*, 54 Iowa, 301; *Hinds v. Chamberlin*, 6 N. H. 225; *Ward v. Allen*, 2 Met. 53; *Guilford v. March*, 89 N. C. 268; *Dunkin v. Hodge*, 46 Ala. 523; *Commonwealth*

example, of an undertaking to stifle a criminal prosecution,¹ or influence its favorable termination.² And it is the same of a security or promise given with the mere expectation that it will have such effect, or prevent a prosecution from being commenced.³ But —

§ 494. **Amends.** — This doctrine does not render void a promise or security given as mere amends for the civil wrong⁴ involved in the criminal transaction.⁵ For example, a thief may make a valid promise to restore or pay for the thing stolen.⁶ Even a threat of prosecution will not invalidate the civil adjustment if in itself fair and correct.⁷ So, —

§ 495. **Settling Private Suit** — (**Bastardy** — **Bankruptcy**). — It is always commendable to compromise a private suit;⁸ therefore, for example, an agreement not to prosecute one under the bastardy act is a good consideration for a promise.⁹ But compromises in violation of bankrupt laws, and the like, where other persons than the parties compromising may be injuriously affected, are violative of the public policy on which the laws are founded, and void.¹⁰

§ 496. **Other Obstructions.** — In addition to the foregoing illustrations of the doctrine, that a contract tending to the obstruction of any form of justice as administered in the

v. Johnson, 3 Cush. 454; *Gorham v. Keyes*, 137 Mass. 583.

¹ *Shaw v. Reed*, 30 Maine, 105; *Ward v. Allen*, 2 Met. 53; *Baker v. Farris*, 61 Misso. 389; *Barclay v. Breckinridge*, 4 Met. Ky. 374; *Snyder v. Willey*, 33 Mich. 483; *Southern Express Co. v. Duffey*, 48 Ga. 358; *Soule v. Bonney*, 37 Maine, 128; *Keir v. Leeman*, 6 Q. B. 308.

² *Ricketts v. Harvey*, 78 Ind. 152; *Rhodes v. Neal*, 64 Ga. 704; *Averbeck v. Hall*, 14 Bush, 505; *Barron v. Tucker*, supra; *Ormerod v. Dearman*, 4 Out. Pa. 561.

³ *Riddle v. Hall*, 3 Out. Pa. 116; *Laing v. McCall*, 50 Vt. 657.

⁴ *Catlin v. Henton*, 9 Wis. 476; *Mathison v. Hanks*, 2 Hill, S. C. 625; *Puckett v. Roquemore*, 55 Ga. 235; *Malli v. Willett*, 57 Iowa, 705; *Flower*

v. Sadler, 9 Q. B. D. 83, 10 Q. B. D. 572; *Breathwit v. Rogers*, 32 Ark. 758.

⁵ 1 Bishop Crim. Law, § 264-278.

⁶ *Von Windisch v. Klaus*, 46 Conn. 433.

⁷ *Plant v. Gunn*, 2 Woods, 372; *Ward v. Lloyd*, 6 Man. & G. 785, 7 Scott N. R. 499; *Flower v. Sadler*, supra; post, § 720, 721.

⁸ Ante, § 57; *Bellows v. Sowles*, 55 Vt. 391.

⁹ *Burgen v. Straughan*, 7 J. J. Mar. 583; *Hays v. McFarlan*, 32 Ga. 699; *Weaver v. Waterman*, 18 La. An. 241; *Maxwell v. Campbell*, 8 Ohio State, 265; *Breathwit v. Rogers*, 32 Ark. 758; *Keir v. Leeman*, 6 Q. B. 308.

¹⁰ *Wiggin v. Bush*, 12 Johns. 306; *Rice v. Maxwell*, 13 Sm. & M. 289; *Payne v. Eden*, 3 Caines, 213.

courts is void,¹ may be mentioned an undertaking to abstain from testifying as a witness in a suit,² to procure a witness to swear to a particular thing,³ or to pay a witness more if the party succeeds than if he does not.⁴ And any bargain tending to influence the witness's testimony is within this principle.⁵ So, where a divorce has been wrongfully obtained, a subsequent agreement not to disturb it is forbidden by public policy.⁶ But the withdrawal of a divorce suit is an act which the law approves.⁷ An agreement not to remove a suit to the United States courts from a State court is invalid, and a statute of a State requiring it is void as prohibited by the constitution of the United States.⁸

§ 497. **Champerty — Maintenance.** — Contracts involving champerty or any other form of maintenance are, under the common law as it existed in England when our country was settled, void. With us the old doctrine has been greatly modified in later times, and the present rulings differ in our States. In some of the States, little of this impediment remains; in others, more; and, in numbers of them, it still presents nearly its original proportions.⁹ In a work so general as this, it would be unwise to enter minutely into the subject; since, after all, the practitioner would be compelled to consult the rulings of his own tribunals.

III. *Contracts in Obstruction of Governmental Order.*

§ 498. **Elections.** — Obviously a contract to commit an election fraud or other offence against the election laws is,

¹ See, for other illustrations, *Dixon v. Olmstead*, 9 Vt. 310; *Douville v. Merrick*, 25 Wis. 688; *Stoutenburg v. Lybrand*, 13 Ohio State, 228; *Porter v. Jones*, 52 Misso. 399; *Price v. Caperton*, 1 Duvall, 207; *Doughty v. Owen*, 24 Missis. 404.

² *Valentine v. Stewart*, 15 Cal. 387; *Badger v. Williams*, 1 D. Chip. 137; *Bierbauer v. Wirth*, 10 Bis. 60.

³ *Patterson v. Donner*, 48 Cal. 369.

⁴ *Dawkins v. Gill*, 10 Ala. 206. See *Wellington v. Kelly*, 84 N. Y. 543.

⁵ *Haines v. Lewis*, 54 Iowa, 301.

⁶ *Comstock v. Adams*, 23 Kan. 513, 523.

⁷ *Adams v. Adams*, 91 N. Y. 381.

⁸ *Insurance Co. v. Morse*, 20 Wal. 445; *Doyle v. Continental Ins. Co.* 94 U. S. 535.

⁹ 2 *Bishop Crim. Law*, § 121-140; *Evans v. Bell*, 6 Dana, 479; *McMahan v. Bowe*, 114 Mass. 140; *Martin v. Clarke*, 8 R. I. 389; *Brown v. Beauchamp*, 5 T. B. Monr. 413; *Arden v. Patterson*, 5 Johns. Ch. 44; *McMicken*

when the thing done or attempted is indictable,¹ void as against law. And the rule of public policy extends further; and renders void every contract tending to obstruct the unbiassed selection of men for positions of public trust: as, where a candidate, in consideration of money or influence to help his election, promises that the person furnishing it shall share in the profits of the office,² or be appointed to an office under him;³ or where he undertakes to pay for food and liquor furnished to his "friends."⁴

§ 499. **Influencing Official Conduct.** — Attempts to influence official conduct violate public policy or not according to their nature and circumstances. A lawyer or other person may properly appear before the officer, at a suitable time, openly, and while the officer is acting in the discharge of the duties of his office, — as, before a court or legislative committee, — and present facts and arguments to move him, not corruptly, but legitimately; and a promise to pay for such services will be good.⁵ But all private attempts of the sort, however honest and fair in themselves, being contrary to what ought to be the known and established course in every office, — and all attempts, however open, by addressing to the officer other than public considerations, — are detrimental to the public interests; therefore contracts founded upon them are void. Examples are lobbying⁶ and other contracts to employ private influence with a public officer.⁷

v. Perin, 18 How. U. S. 507; *Byrd v. Odem*, 9 Ala. 755; *Scobey v. Ross*, 13 Ind. 117; *Coquillard v. Bearss*, 21 Ind. 479; *Slade v. Rhodes*, 2 Dev. & Bat. Eq. 24; *Weedon v. Wallace*, Meigs, 286; *Burt v. Place*, 6 Cow. 431; *Nichols v. Bunting*, 3 Hawks, 86; *Martin v. Amos*, 13 Ire. 201.

¹ *Bishop Stat. Crimes*, § 802–826.

² *Martin v. Wade*, 37 Cal. 168; *Gaston v. Drake*, 14 Nev. 175. And see, of the like sort, *O'Rear v. Kiger*, 10 Leigh, 622; *Gray v. Hook*, 4 Comst. 449. See also *Eddy v. Capron*, 4 R. I. 394; *Haas v. Fenlon*, 8 Kan. 601; *Stroud v. Smith*, 4 Houst. 448; *Ferris v. Adams*, 23 Vt. 136.

³ *Robertson v. Robinson*, 65 Ala. 610; *Hager v. Catlin*, 18 Hun, 448.

⁴ *Duke v. Asbee*, 11 Ire. 112.

⁵ *Winpenny v. French*, 18 Ohio State, 469; *Price v. Caperton*, 1 Duvall, 207; *Wilkey v. Collier*, 7 Md. 273; *Sedgwick v. Stanton*, 4 Kernan, 289; *Bryan v. Reynolds*, 5 Wis. 200.

⁶ *Mills v. Mills*, 40 N. Y. 543; *Trist v. Child*, 21 Wal. 441; *Frost v. Belmont*, 6 Allen, 152; *Marshall v. Baltimore, &c. Railroad*, 16 How. U. S. 314; *Gil v. Williams*, 12 La. An. 219; *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Powers v. Skinner*, 34 Vt. 274; *Usher v. McBratney*, 3 Dillon, 385.

⁷ *Maguire v. Smock*, 1 Wils. Ind. 92;

§ 500. **Contracts with Officer.** — Any contract between an officer and a private person, by which the former undertakes to do anything of official duty, right or wrong, in accord with such duty or contrary to it, is in a greater or less degree an obstruction to the unbiassed exercise of his office, even where it does not influence him corruptly; therefore it is void.¹ But this does not prevent him from receiving or contracting for lawful compensation for his services;² or, as we have seen,³ from taking in proper circumstances a bond of indemnity.

§ 501. **Legislation.** — The foregoing principles show that contracts relating to the procurement of legislation may be within the one class or the other according to the particular case.⁴ Thus it was held that an agreement to obtain the passage of a law, made with the corrupt intent to collect of the State a claim, invalidates the claim, even in the hands of an assignee.⁵ But there are various forms of contract relating to private bills and even to public ones, — such as the withdrawal of opposition to the former, by one interested,⁶ — to which there is no objection.⁷

§ 502. **Pardon.** — It is believed that an undertaking to procure a pardon will, also, be good or bad according to the circumstances, as tested by the foregoing principles. There is some entanglement in the decisions.⁸

Hutchen v. Gibson, 1 Bush, 270; *Cook v. Shipman*, 51 Ill. 316. And see *Devlin v. Brady*, 36 N. Y. 531; *Dudley v. Butler*, 10 N. H. 281; *Smith v. Applegate*, 3 Zab. 352; *Winpenny v. French*, 18 Ohio State, 469.

¹ *Satterlee v. Jones*, 3 Duer, 102; *Odineal v. Barry*, 24 Missis. 9; *Callagan v. Hallett*, 1 Caines, 104; *Randolph v. Jones*, Breese, 103; *Richardson v. Crandall*, 48 N. Y. 348; *Newsom v. Thighen*, 30 Missis. 414; *Waldron v. Evans*, 1 Dak. 11.

² Ante, § 47; 2 Bishop Crim. Law, § 395; *Converse v. United States*, 21 How. U. S. 463, 469; *Morrell v. Quarles*, 35 Ala. 544; *Evans v. Trenton*, 4 Zab. 764; *Bona v. Davant*, *Riley Eq.* 44; *Massing v. The State*, 14 Wis. 502.

³ Ante, § 483.

⁴ *Weed v. Black*, 2 MacAr. 268; *Reed v. Peper Tobacco Warehouse Co.* 2 Misso. Ap. 82.

⁵ *Monroe Bank v. The State*, 26 Hun, 581.

⁶ *Vauxhall Bridge Co. v. Spencer, Jacob*, 64, 68, 2 Madd. 356.

⁷ *Simpson v. Howden*, 9 Cl. & F. 61; *Edwards v. Grand Junction Railway*, 7 Sim. 337, 1 Myl. & C. 650; *Macgregor v. Dover, &c. Railway*, 18 Q. B. 618; *Bowman v. Coffroth*, 9 Smith, Pa. 19, 23.

⁸ *Formby v. Pryor*, 15 Ga. 258; *Meadow v. Bird*, 22 Ga. 246; *Bird v. Meadows*, 25 Ga. 251; *Bowman v. Coffroth*, 9 Smith, Pa. 19, 23; *Marshall v. Baltimore, &c. Railroad*, 16 How. U. S. 314; *Kribben v. Huycraft*, 26 Misso. 396; *Hatzfield v. Gulden*, 7 Watts, 152;

§ 503. **Tending to Corrupt an Officer.** — Of course, the promise of a bribe is void;¹ for it is a breach of the criminal law. Void also is a promise to pay a contractor money if he will repudiate his contract for carrying the mail, even though he has given bonds which will secure the government against loss.² Illustrations of this principle might be multiplied indefinitely.³ So —

§ 504. **Other Obstructions.** — There are other forms of obstruction too numerous to be particularized. The principles already appear, and the practitioner will have no difficulty in applying them to the varying cases as they arise.⁴

IV. *Contracts violative of Good Morals.*

§ 505. **Protected by Law.** — Prominent among the interests which the law protects, are the public morals.⁵ To some, indeed, its criminal justice seems a little lax regarding them; but not so, in general, is its civil. Hence, —

Doctrine defined. — No agreement prejudicial to public morals, whether involving a violation of the criminal law or not, can have force. The common expression is, that a contract *contra bonos mores*, or to commit any immoral act, is void.⁶ Thus, —

§ 506. **Prostitution** — (**Bawdy-house**). — Any contract auxiliary to the keeping of a bawdy-house or otherwise encouraging prostitution, — or, in the language of Pollock, C. B., “supplying a thing with the knowledge that it is going to be used for that purpose,” — is void.⁷ This includes the letting

Chadwick v. Knox, 11 Fost. N. H. 226;
O'Reilly v. Cleary, 8 Misso. Ap. 186.

¹ Smith v. Stotesbury, 1 W. Bl. 204;
s. c. nom. Stotesbury v. Smith, 2 Bur.
924.

² Weld v. Lancaster, 56 Maine, 453.
See Gulick v. Ward, 5 Halst. 87.

³ For example, Lucas v. Allen, 80
Ky. 681; Caton v. Stewart, 76 N. C.
357; Fawcett v. Eberly, 58 Iowa, 544.
See Stout v. Ennis, 28 Kan. 706.

⁴ See, for example, Cromwell v. Con-
necticut Brown Stone Quarry Co. 50

Conn. 470; Rodgers v. Bass, 46 Texas,
505; Hawes v. Miller, 56 Iowa, 395;
Gould v. Kendall, 15 Neb. 549; The
State v. Elting, 29 Kan. 397; Denison
v. Crawford, 48 Iowa, 211.

⁵ 1 Bishop Crim. Law, § 500.

⁶ 2 Kent Com. 466; Fores v. Johns,
4 Esp. 97; Jones v. Randall, Cowp. 37,
39; Forsythe v. The State, 6 Ohio, 19,
21; Dumont v. Dufore, 27 Ind. 263;
Merrick v. Bank of the Metropolis, 8
Gill, 59.

⁷ Pearce v. Brooks, Law Rep. 1 Ex.

of a house for bawdry,¹ letting a carriage to a prostitute as a part of her equipage to entice men,² and in some circumstances furnishing her with board³ and clothing.⁴ The application of this doctrine involves a few nice distinctions, not on all of which are the courts quite agreed.⁵ Some of these things are within the inhibitions of statutes, and —

§ 507. **Contravening Statute.** — An agreement meant to enable one to contravene any statute for the protection of public morals is without effect.⁶

§ 508. **Bawdy Libel.** — A bawdy libel, whether a picture or book, or whatever else its form, tends to impair the public morals; so that no contract for making it, printing it, or in any way assisting therein, and no agreement for its sale, will be enforced.⁷ Nor can the author or publisher maintain a suit at law or in equity for damages, or for an injunction, against a printer who pirates the libel.⁸

§ 509. **Illicit Cohabitation — (Promise — Reparation).** — All illicit commerce between the sexes being immoral, a promise to pay for it, made before it takes place, is void even where the act is not indictable.⁹ Nor is it otherwise though the thing promised is the most appropriate recompense possible, marriage; the promise is void.¹⁰ Nor yet does a seal help the promise; because, though it implies a consideration, the true consideration vitiates what else would be adequate.¹¹ After

213, 217; *Smith v. White*, Law Rep. 1 Eq. 626.

¹ *Crisp v. Churchill*, cited 1 B. & P. 340; *Jennings v. Throgmorton*, Ryan & Moody, N. P. 251. See 1 Bishop Crim. Law, § 1090-1096.

² *Pearce v. Brooks*, supra; *Girardy v. Richardson*, 1 Esp. 13.

³ *Mackbee v. Griffith*, 2 Cranch C. C. 336. Compare with *Lloyd v. Johnson*, 1 B. & P. 340; 2 Chit. Con. 11th Am. ed. 981.

⁴ *Bowry v. Bennet*, 1 Camp. 348.

⁵ Compare with the foregoing cases *Armfield v. Tate*, 7 Ire. 258; *Hanauer v. Doane*, 12 Wal. 342; *McGavock v. Puryear*, 6 Coldw. 34; *Michael v. Bacon*, 49 Misso. 474; *Taylor v. Chester*, Law Rep. 4 Q. B. 309.

⁶ *Ritchie v. Smith*, 6 C. B. 462, 13 Jur. 63.

⁷ *Fores v. Johnes*, 4 Esp. 97; *Poplett v. Stockdale*, Ryan and Moody, N. P. 337, 2 Car. & P. 198; *Gale v. Leckie*, 2 Stark. 107.

⁸ *Stockdale v. Onwhyn*, 5 B. & C. 173, 2 Car. & P. 163.

⁹ *Walker v. Gregory*, 36 Ala. 180; *Winebrinner v. Weisiger*, 3 T. B. Monr. 32; *Sherman v. Barrett*, 1 McMullen, 147; *Singleton v. Bremar*, Harper, 201; *Trovinger v. McBurney*, 5 Cow. 253; *Wilson v. Eusworth*, 85 Ind. 399.

¹⁰ *Baldy v. Stratton*, 11 Jones, 316; *Goodall v. Thurman*, 1 Head, 209.

¹¹ Ante, § 51, 119-123; *Walker v. Perkins*, 3 Bur. 1568; *Friend v. Harrison*, 2 Car. & P. 584; *In re Vallance*, 26

the intercourse, a parol undertaking to pay for it is void, not because it is immoral to repair a wrong, but because the consideration is past;¹ and, in a case like this, the law cannot imply a prior request.² But an obligation under seal in reparation of the wrong will be good; for this is not immoral.³ And it is the same of any executed⁴ gift, whether under seal or not, it cannot be recalled.⁵ Even though a gift is made in view of future illicit commerce, if it is perfected by delivery, it will stand.⁶ And, —

§ 510. **Further of Reparation.** — In various circumstances, after an illicit cohabitation has taken place, some collateral matter may be brought in for a consideration, to enable one to make a valid promise not under seal, the leading motive to which is reparation for the wrong.⁷ If the case is within the bastardy acts, a forbearance to prosecute under them will be a good consideration.⁸ And a promise to a husband, in settlement of a claim for the seduction of his wife, will be valid.⁹ And —

§ 511. **Marriage** — is specially favored in this class of cases. Therefore the bond of a seducer to the woman seduced, undertaking to marry her and, if he deserts her or fails to support her or the child, to pay her a sum named, is good.¹⁰ “A

Ch. D. 353, 355, 356; Hall v. Palmer, 3 Hare, 532, 8 Jur. 459.

¹ Beaumont v. Reeve, 8 Q. B. 483.

² Ante, § 90-92.

³ Gray v. Mathias, 5 Ves. 286; Met. Con. 222; Hall v. Palmer, supra; Bivins v. Jarnigan, 3 Baxter, 282. See Cusack v. White, 2 Mill. 279; Shenk v. Mingle, 13 S. & R. 29. And, for the law on several of the propositions in the text, Ayerst v. Jenkins, Law Rep. 16 Eq. 275.

⁴ Ante, § 81, 82; post, § 545, 627.

⁵ Bivins v. Jarnigan, supra; Gay v. Parpart, 106 U. S. 679; Carter v. Montgomery, 2 Tenn. Ch. 216; Gisaf v. Neval, 31 Smith, Pa. 354. Yet in some circumstances it will be void as against creditors. Jackson v. Miner, 101 Ill. 550.

⁶ Hill v. Freeman, 73 Ala. 200, 201, Somerville, J., observing: “We under-

stand it to be a first principle, not now to be assailed or even doubted, that where a contract based on a consideration contrary to law, immoral, or opposed to public policy, has been fully and voluntarily executed, if the parties are *in pari delicto*, the courts will not interfere to disturb the acquired rights of either, at the instance of the other. The result is the same as if the contract had originally been legal and valid, and neither can recover the consideration which he has thus voluntarily parted with.” And see post, § 545, 627.

⁷ Self v. Clark, 2 Jones Eq. 309; Flanagan v. Garrison, 28 Ga. 136; Trovinger v. McBurney, 5 Cow. 253.

⁸ Ante, § 495.

⁹ See McGowen v. Bush, 17 Texas, 195.

¹⁰ Armstrong v. Lester, 43 Iowa, 159.

marriage brokerage contract — that is, an undertaking for reward to procure a marriage between two parties — is void.”¹ *A fortiori*, marriage gambling contracts are void.²

§ 512. **Secrecy as to Immorality.** — It has been held that one may lawfully buy another's silence as to criminal intercourse charged to have taken place between the former and the latter's wife; so that a promissory note, given on this consideration, is good. “There is,” said Woods, C. J., “no rule of public policy which forbids such a contract for silence, so long as it is not in contemplation to conceal and prevent the punishment of a crime. . . . The public morals will surely not suffer by the suppressing of such scandals.”³

V. *Contracts in Restraint of Trade.*

§ 513. **On what Ground.** — The prosperity alike of the community and of the individual is largely promoted by leaving every man free to occupy himself in such business, and at such place, as the demands of patronage and his own particular means and qualifications indicate. Chiefly upon this principle the law declines to enforce contracts in restraint of trade.⁴ Where there is such restraint on the one hand, there is monopoly on the other, and monopolies are odious to the law; so that, upon this ground also, if indeed it is not deemed identical with the other, the law of this subject proceeds.⁵ Hence, —

§ 514. **Doctrine defined.** — The doctrine of this sub-title is, that the courts will enforce no contract whereby a party utterly excludes himself from the following of any lawful trade or business; while yet he may, for a valuable consideration but not otherwise, put himself under such reasonable

¹ 2 Chit. Con. 11th Am. ed. 988, referring to *Hall v. Potter*, 3 Lev. 411; *Keat v. Allen*, 2 Vern. 588; *Roberts v. Roberts*, 3 P. Wms. 66, 74, note; Co. Lit. 206 b, note; 1 Fonb. Eq. 5th ed. 263. And see 1 Story Eq. § 260-264.

² *Chalfant v. Payton*, 91 Ind. 202.

³ *Wells v. Sutton*, 85 Ind. 70, 74.

⁴ *Oregon Steam Nav. Co. v. Winsor*, 20 Wal. 64.

⁵ *Arnot v. Pittston, &c. Coal Co.* 68 N. Y. 558; *Skrainka v. Scharringhausen*, 8 Misso. Ap. 522; *Craft v. McConoughy*, 79 Ill. 346; *Western Union Tel. Co. v. American Union Tel. Co.* 65 Ga. 160.

restrictions of time, place, and circumstances as shall not materially impair the general right. More in detail, —

§ 515. **Unlimited Restraint.** — An agreement, without limitation, not to carry on a particular trade, which is lawful, and beneficial to the community and to the individual, is void as against public policy.¹ And it is not otherwise though the party promising is a foreigner.² But —

§ 516. **Permissible Restraint.** — Neither public nor private interests are prejudiced where persons in an employment divide, one conducting it in one place and another in another. Therefore, if, on good reason, and for a valuable consideration,³ a man promises not to carry on a specified business within a defined locality of reasonable extent, either generally, or especially where the restriction is also to a limited number of years, — and perhaps, in some very exceptional cases, under unusual circumstances, where the restriction is for a short time with no bound of space, — the undertaking is binding upon him.⁴ Within this doctrine, —

§ 517. **Meaning of "Reasonable Space."** — A "reasonable space" for carrying on a business is not ascertainable by any measurement in miles, it depends on the nature and demands of the business, the situation of the country and population, and the like.⁵ The question is one of law for the court.⁶ It

¹ *Alger v. Thacher*, 19 Pick. 51; *Hilton v. Eckersley*, 6 Ellis & B. 47, 66; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Homer v. Ashford*, 3 Bing. 322; *Dean v. Emerson*, 102 Mass. 480; *Ross v. Sadgbeer*, 21 Wend. 166; *Heichew v. Hamilton*, 3 Greene, Iowa, 596; *Oregon Steam Nav. Co. v. Winsor*, 20 Wal. 64.

² *Rousillon v. Rousillon*, 14 Ch. D. 351, 369.

³ Ante, § 126; Met. Con. 233.

⁴ *Perkins v. Clay*, 54 N. H. 518; *Saratoga County Bank v. King*, 44 N. Y. 87, 91; *Guerand v. Dandelet*, 32 Md. 561; *Jenkins v. Temples*, 39 Ga. 655; *Treat v. Shoninger Melodeon Co.* 35 Conn. 543; *Hatcher v. Andrews*, 5 Bush, 561; *Jones v. Heavens*, 4 Ch. D. 636; *Leather Cloth Co. v. Lorisont*, Law Rep. 9 Eq. 345; *McAlister v. Howell*,

42 Ind. 15; *Grasselli v. Lowden*, 11 Ohio State, 349; *Holmes v. Martin*, 10 Ga. 503; *Chappel v. Brockway*, 21 Wend. 157; *Kellogg v. Larkin*, 3 Chand. 133; *Beard v. Dennis*, 6 Ind. 200; *Pierce v. Woodward*, 6 Pick. 206; *Goodman v. Henderson*, 58 Ga. 567; *Collins v. Locke*, 4 Ap. Cas. 674; *Hedge v. Lowe*, 47 Iowa, 137; *Curtis v. Gokey*, 68 N. Y. 300; *Ellis v. Jones*, 56 Ga. 504; *Morris v. Colman*, 18 Ves. 437; *Chesman v. Nainby*, 1 Bro. P. C. 234; *Whittaker v. Howe*, 3 Beav. 383; *Stewart v. Challacombe*, 11 Bradw. 379; *Smalley v. Greene*, 52 Iowa, 241.

⁵ *Duffy v. Shockey*, 11 Ind. 70; *Whitney v. Slayton*, 40 Maine, 224; *Gilman v. Dwight*, 13 Gray, 356; *Hitchcock v. Coker*, 6 A. & E. 438, 454.

⁶ *Mallan v. May*, 11 M. & W. 653, 658.

may be large enough to render the contract effectual for its lawful purpose, yet not palpably larger; or, as otherwise expressed, not "larger and wider than the protection of the party with whom the contract is made can possibly require."¹ Commonly, or nearly always, the full extent of the State will be too great;² but it has been laid down in England,³ and by the Supreme Court of the United States,⁴ that there is no absolute limitation of space. A physician may restrict himself from a particular town and its vicinity.⁵ "Within a radius of ten miles of Litchfield" was held good as to dentistry.⁶ And in England an agreement was sustained whereby a solicitor, on selling out his business, undertook not to practice as solicitor in any part of Great Britain for twenty years without the consent of the purchaser.⁷ Other illustrations appear in the cases cited in the note.⁸

§ 518. **Other like Agreements.** — One's promise not to ex-

¹ *Rousillon v. Rousillon*, 14 Ch. D. 351, 363; *Hitchcock v. Coker*, 6 A. & E. 438, 454; *Ward v. Byrne*, 5 M. & W. 548, 561.

² *More v. Bonnet*, 40 Cal. 251; *Dean v. Emerson*, 102 Mass. 480; *Nobles v. Bates*, 7 Cow. 307; *Taylor v. Blanchard*, 13 Allen, 370.

³ *Rousillon v. Rousillon*, *supra*.

⁴ *Oregon Steam Nav. Co. v. Winsor*, 20 Wal. 64.

⁵ *Warfield v. Booth*, 33 Md. 63; *McClurg's Appeal*, 8 Smith, Pa. 51; *Butler v. Burleson*, 16 Vt. 176; *Davis v. Mason*, 5 T. R. 118.

⁶ *Cook v. Johnson*, 47 Conn. 175.

⁷ *Whittaker v. Howe*, 3 Beav. 383. "The question," said Lord Langdale, M. R. "is, whether the restraint ought to be considered as reasonable in this particular case. The business is that of an attorney and solicitor, which, to a large extent, may be carried on by correspondence or by agents, and as to which it has already been decided that a restraint of practice within a distance of one hundred and fifty miles was not an unreasonable restraint. It was decided in the case of the surgeon dentist, where the occupation required the per-

sonal presence of the practiser and the patient at the same place, that a restraint of practice within a distance of one hundred miles was an unreasonable restraint." p. 394. See also *Dendy v. Henderson*, 11 Exch. 194.

⁸ *Grundy v. Edwards*, 7 J. J. Mar. 368; *Archer v. Marsh*, 6 A. & E. 959; *California Steam Nav. Co. v. Wright*, 6 Cal. 258; *Dunlop v. Gregory*, 6 Selden, 241; *Bowser v. Bliss*, 7 Blackf. 344; *Clark v. Crosby*, 37 Vt. 188; *Laubheimer v. Mann*, 17 Wis. 542; *Pierce v. Fuller*, 8 Mass. 223; *Perkins v. Lyman*, 9 Mass. 522; *Allsopp v. Wheatcroft*, Law Rep. 15 Eq. 59; *Horner v. Graves*, 7 Bing. 735; *Grasselli v. Lowden*, 11 Ohio State, 349, 357; *Bunn v. Guy*, 4 East, 190; *Price v. Green*, 16 M. & W. 346; *Harms v. Parsons*, 32 Beav. 328, 9 Jur. n. s. 145. A patent being a monopoly, perhaps the general doctrines are qualified when applied to the sale of patented articles. And see *Kinsman v. Parkhurst*, 18 How. U. S. 289; *Billings v. Ames*, 32 Misso. 265; *Costar v. Brush*, 25 Wend. 628; *Morse Twist Drill, &c. Co. v. Morse*, 103 Mass. 73.

ercise his skill and knowledge as an inventor is void.¹ It has been adjudged that a dramatic writer may bind himself to produce pieces only for a particular theatre;² still, in reason, such a contract must, to be valid, be limited in time, and otherwise guarded by provisions freeing him from undue restraint.³ One may lawfully undertake, for a period specified, to manufacture for the person with whom he is contracting, and no other.⁴ So a promise by a physician, selling out his drug store, to send to the purchaser all his prescriptions is valid.⁵ And a solicitor may lawfully contract with a city corporation to give to it his entire exertions and do no other professional business.⁶ But any agreement between large dealers, meant to control the market and obtain exorbitant prices, is an unlawful conspiracy against trade, and void.⁷

§ 519. **Consideration.** — We have already seen that these contracts require a valuable consideration, as to which there are peculiarities which also have been explained.⁸

§ 520. **Good-will.** — The stipulation we are considering is often introduced into the agreement selling the good-will⁹ of a business. A good-will has been curtly defined to be "the probability that the old customers will resort to the old place."¹⁰ A sale of it simply, and no more, implies no obligation on the part of the seller not to engage in the same business at another stand in the same neighborhood;¹¹ but there are decisions to the effect that, if the contract of sale is spe-

¹ Albright v. Teas, 10 Stew. Ch. 171.

² Morris v. Colman, 18 Ves. 437.

³ Consult 2 Story Eq. § 958 and note.

⁴ Schwalm v. Holmes, 49 Cal. 665.

⁵ Ward v. Hogan, 11 Abb. New Cas. 478.

⁶ Galloway v. London, Law Rep. 4 Eq. 90.

⁷ Arnot v. Pittston, &c. Coal Co. 68 N. Y. 558; Craft v. McConoughy, 79 Ill. 346; Fairbank v. Leary, 40 Wis. 637; Central Ohio Salt Co. v. Guthrie, 35 Ohio State, 666, 672. And see Collins v. Locke, 4 Ap. Cas. 674; Western Union Tel. Co. v. Chicago, &c. Railroad, 86 Ill. 246; Western Union Tel. Co. v. American Union Tel. Co. 65 Ga. 160;

Wiggins Ferry Co. v. Ohio, &c. Railway, 72 Ill. 360.

⁸ Ante, § 126, 516; Collins v. Locke, 4 Ap. Cas. 674; Smalley v. Greene, 52 Iowa, 241; Shober, &c. Co. v. Kerting, 107 Ill. 344; Burckhardt v. Burckhardt, 36 Ohio State, 261.

⁹ Ante, § 65.

¹⁰ Cruttwell v. Lye, 17 Ves. 335, 346; Pearson v. Pearson, 27 Ch. D. 145; Bradford v. Peckham, 9 R. I. 250; Porter v. Gorman, 65 Ga. 11, 14.

¹¹ Porter v. Gorman, supra; Bergamini v. Bastian, 35 La. An. 60; Moody v. Thomas, 1 Disney, 294; Moreau v. Edwards, 2 Tenn. Ch. 347.

cific as to local limits, the seller cannot enter again into the business within the specified locality.¹ Assuming his right to re-establish himself in the business, it is probably the better doctrine that, while he may advertise it, and may serve old customers who apply to him, he cannot solicit them individually for their patronage, though there are eminent judicial opinions that he can.² Clearly, if the sale is compulsory, he can.³ And, whether compulsory or not, he is not forbidden to enter into the service of another person, who, in the same town but not at the same stand, is carrying on the same business.⁴ It has been held that the sale of the good-will of a school does not obligate the vendor to use personal efforts to influence the attendance of pupils.⁵ Where the sale is, as is common, accompanied by special stipulations, they will furnish the measure of the rights of the parties; and, as they differ in the several cases, we need not look into details here.⁶ If the agreement is not to engage in the same business for a specified time, the seller may, on the expiration of the time, solicit his former customers.⁷

VI. *Contracts partaking of Unlawful Conspiracy.*

§ 521. **Relations of Topic.** — In one aspect, all contracts in conflict with the law or public policy are within the scope of this sub-title; they are combinations of two or more persons, which is the idea of a conspiracy, to do what the law or

¹ *Dwight v. Hamilton*, 113 Mass 175, 178; *Angier v. Webber*, 14 Allen, 211; *Munsey v. Butterfield*, 133 Mass. 492.

² *Labouchere v. Dawson*, Law Rep. 13 Eq. 322; *Pearson v. Pearson*, supra; *Leggott v. Barrett*, 15 Ch. D. 306; *Richardson v. Peacock*, 6 Stew. Ch. 597, 599.

³ *Walker v. Mottram*, 19 Ch. D. 355.

⁴ *Grimm v. Warner*, 45 Iowa, 106.

⁵ *McCord v. Williams*, 15 Norris, Pa. 78.

⁶ For illustrations, see *Moreau v. Edwards*, supra; *Baker v. Cordon*, 86 N. C. 116; *Morgan v. Perhamus*, 36

Ohio State, 517; *Grow v. Seligman*, 47 Mich. 607; *Thayer v. Younge*, 86 Ind. 259; *McIntyre v. Belcher*, 14 C. B. N. S. 654, 10 Jur. N. S. 239; *Lewis v. Seabury*, 74 N. Y. 409; *Kemp v. Bird*, 5 Ch. D. 974; *Garrison v. Nute*, 87 Ill. 215; *Wiggins Ferry Co. v. Ohio, &c. Railway*, 72 Ill. 360; *Baker v. Pottmeyer*, 75 Ind. 451; *Curtis v. Gokey*, 68 N. Y. 300; *Smith v. Martin*, 80 Ind. 260; *Sander v. Hoffman*, 64 N. Y. 248; *Richardson v. Peacock*, 6 Stew. Ch. 597.

⁷ *Hanna v. Andrews*, 50 Iowa, 462. **Firm Name.** — As to the right of the purchaser to use the name of the old firm, see *Levy v. Walker*, 10 Ch. D. 436.

public policy forbids. But, for practical convenience, our expositions here will be limited much as, in the books, are the civil and criminal wrongs of conspiracy. A conspiracy is not the subject of a civil action until a third person has suffered a damage from something done under it; then, and not before, he may sue; and the wrong inflicted, not the combination to do it, is the real foundation of the action.¹ But an indictment will lie, whether the conspiracy is to injure an individual or the public, as soon as the wrongful confederacy is entered into, though there is never an overt act committed.² So that one examining the subject of this sub-title will find little help from the civil law of conspiracy, but much from the criminal. Hence, —

§ 522. **Doctrine defined.** — The doctrine of this sub-title is, that a contract which embodies any indictable confederation, whether to injure the public or an individual, is void as against law;³ and, short of this, one merely tending to the same mischief is void as against public policy.⁴ Thus, —

§ 523. **Prices.** — We have already seen, that any agreement between persons in trade, made to inflate the market and obtain for their commodities exorbitant prices, is void as a conspiracy to injure the public.⁵ And it is the same of all other like bargains, devised to compel individuals or corporations to pay undue prices for anything, or to create a monopoly.⁶ So —

§ 524. **Any Fraud on Public.** — No agreement for defrauding the public can be valid.⁷ For example, “No man,” said Scott, J., “has the right to sell his reputation or skill in any

¹ *Savill v. Roberts*, 1 Ld. Raym. 374, 378; *Hutchins v. Hutchins*, 7 Hill, N. Y. 104, 108; *Herron v. Hughes*, 25 Cal. 555.

² 2 Bishop Crim. Law, § 171, 181, 185, 192, 197.

³ Ante, § 471.

⁴ Ante, § 473-478. The doctrine, nearly in its full proportions, has been otherwise expressed to be, that, where two or more parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, — or, where it was against

public policy, or contrary to good morals, — no one of them can maintain a suit thereon against any other. *York v. Merritt*, 77 N. C. 213; *Wight v. Rinds-kopf*, 43 Wis. 344.

⁵ Ante, § 518.

⁶ *Marsh v. Russell*, 66 N. Y. 288; *Kelly v. Devlin*, 58 How. Pr. 487; *Woodruff v. Berry*, 40 Ark. 251; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434.

⁷ *People v. Stephens*, 71 N. Y. 527.

profession, whatever it may be, and thus enable an unknown party to perpetrate a fraud upon the public in his name ;” so that a contract between two physicians, whereby the one has the other’s permission to personate him at his office in medical practice, is void.¹ And it is the same of a contract by which one party is to supply the other with domestic sardines, so labelled that they shall appear to have been imported ; for it is an attempt to cheat the public.² It is even sufficient that there is a tendency to the public injury ;³ thus, a contract with the president of a bank to buy shares on condition that the purchaser is made cashier tends to injure many persons, therefore it is void.⁴ Such a contract may be deemed also to violate a —

§ 525. **Public Trust.** — The officers of a corporation, said a learned judge, “ have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of that trust for them to be bought out of office.” Therefore, though a trustee of the corporation may resign, his promise to do it for a pecuniary compensation is against public policy and void.⁵ Equally void, and for the like reason, is a contract between stockholders by which one of them undertakes for money to vote for a particular person as manager, and to increase the salaries.⁶ It is the same also of a contract by officers of a railroad corporation to buy lands and locate the projected road and depots on or near them ; they thereby prostitute their trust to their private emolument.⁷ *A fortiori* —

¹ Jerome v. Bigelow, 66 Ill. 452, 454.

² Materne v. Horwitz, 50 N. Y. Super. (18 Jones & S.) 41.

³ Ante, § 476.

⁴ Noel v. Drake, 28 Kan. 265. Substantially the same in Guernsey v. Cook, 120 Mass. 501.

⁵ Forbes v. McDonald, 54 Cal. 98, 100, opinion by Myrick, J.

⁶ Woodruff v. Wentworth, 133 Mass. 309.

⁷ Cook v. Sherman, 4 McCrary, 20. For like questions, see Pueblo, &c. Railroad v. Taylor, 6 Colo. 1 ; Western

Union Tel. v. Union Pacific Railway, 1 McCrary, 418 ; St. Louis, &c. Railroad v. Mathers, 104 Ill. 257 ; Liebke v. Knapp, 79 Misso. 22 ; Railroad v. Ralston, 41 Ohio State, 573 ; Williamson v. Chicago, &c. Railroad, 53 Iowa, 126 ; Berryman v. Cincinnati Southern Railway, 14 Bush, 755 ; Pixley v. Gould, 13 Bradw. 565 ; Wiggins Ferry Co. v. Chicago, &c. Railroad, 73 Misso. 389 ; Harris v. Roberts, 12 Neb. 631 ; Western Union Tel. v. Atlantic, &c. Tel. 7 Bis. 367 ; Cedar Rapids Bank v. Hendrie, 49 Iowa, 402.

§ 526. **Governmental Trust.** — A governmental trust is within this rule. So that, for example, if a foreign government sends to our country an agent to buy firearms, whereupon one of its consuls residing here agrees with a manufacturer to recommend him to the agent, stipulating for a compensation therefor, the stipulation is void as against public policy.¹ Beyond this, —

§ 527. **Private Fraud on Individual.** — Any agreement between two private persons to defraud a third, whether at an auction or elsewhere, is void as being unlawful.² It is even indictable.³ Therefore, within a rule already stated, a contract which simply tends to this end is void as against public policy.⁴ For example, where one was asked to recommend to the applicant a “responsible and reliable” builder, and he recommended a builder who promised to pay him, for his “trouble,” a sum of money, and who on such recommendation was employed, the court refused to enforce the promise.⁵ In like manner, one cannot “serve two masters;” therefore a private agreement between a party and the other party’s agent, by which the agent is to act for both, is void.⁶ And —

§ 528. **Auction Sales** — are within both private and public considerations. They are a means of converting things into money under urgent circumstances, of settling estates of deceased persons, and the like; so that the interests both of the individual and of the public require them to be conducted with freedom and fairness, and agreements contravening these interests are void. There are some real or apparent differences as to what cases are within this principle. Plainly, if two persons in actual competition intend bidding for an article, then if they agree that one shall abstain from bidding and the

¹ *Oscanyan v. Arms Co.* 103 U. S. 261, 15 Blatch. 79. And see *Ashburner v. Parrish*, 31 Smith, Pa. 52.

² *Sternburg v. Bowman*, 103 Mass. 325; *Harwood v. Knapper*, 50 Misso. 456; *Heineman v. Newman*, 55 Ga. 262; *Powell v. Inman*, 8 Jones, N. C. 436; *Bliss v. Matteson*, 45 N. Y. 22; *Davison v. Seymour*, 1 Bosw. 88; *Jackson v. Duchaire*, 3 T. R. 551; *McKewan v.*

Sanderson, Law Rep. 15 Eq. 229, 234; *Hamilton v. Scull*, 25 Misso. 165; *Fenton v. Ham*, 35 Misso. 409.

³ 2 Bishop Crim. Law, § 198–214.

⁴ Ante, § 473–478, 522.

⁵ *Holcomb v. Weaver*, 136 Mass. 265.

⁶ *Atlee v. Fink*, 75 Misso. 100; *Scribner v. Collar*, 40 Mich. 375; *Lynch v. Fallon*, 11 R. I. 311.

profits shall be divided, the courts will not enforce their bargain.¹ And this rule extends to all other agreements, in whatever form, to stifle fair competition; they are void,² and in various circumstances are even indictable.³ On the other hand, partners, or persons contemplating a partnership as to the particular thing; several, who each want a part, and not the whole, of the thing, and are to divide it between themselves; and others, whose object is not an undue advantage but a fair purchase, may enter into a valid arrangement for one to bid and the rest abstain.⁴

VII. *Gaming Contracts.*

§ 529. **Varying Statutes — Common Law.** — The criminal offence of gaming, including such heads as wagering, betting on elections, horse-racing, lotteries, and the like, is regulated by somewhat varying statutes in our respective States; yet slightly, if at all, by the common law.⁵ Partly on the construction and effect of these statutes, partly on direct terms therein, and partly on doctrines of the common law as to the policy of enforcing wagering and gaming contracts, depend, with us, the civil consequences. The obvious fact, therefore,

¹ *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *National Bank of Metropolis v. Sprague*, 5 C. E. Green, 159; *Jenkins v. Frink*, 30 Cal. 586; *Loyd v. Malone*, 23 Ill. 43; *Wootton v. Hinkle*, 20 Misso. 290; *Sharp v. Wright*, 35 Barb. 236; *People v. Stephens*, 71 N. Y. 527; *Singer Manuf. Co. v. Yarger*, 2 McCrary, 583. On this point the English doctrine appears to be the other way. *Galton v. Emuss*, 1 Collyer, 243.

² *Gardiner v. Morse*, 25 Maine, 140; *James v. Fulcrod*, 5 Texas, 512; *Hunt v. Frost*, 4 Cush. 54; *Hook v. Turner*, 22 Misso. 333; *Jones v. Caswell*, 3 Johns. Cas. 29; *Thompson v. Davies*, 13 Johns. 112; *Ingram v. Ingram*, 4 Jones, N. C. 188; *Martin v. Ranlett*, 5 Rich. 541; *Brisbane v. Adams*, 3 Comst. 129; *Atch-*

eson v. Mallon, 43 N. Y. 147; *Gibbs v. Smith*, 115 Mass. 592.

³ *Levi v. Levi*, 6 Car. & P. 239.

⁴ *Breslin v. Brown*, 24 Ohio State, 565; *National Bank of Metropolis v. Sprague*, supra; *Jenkins v. Frink*, supra; *Smull v. Jones*, 6 Watts & S. 122; *McMinn v. Phipps*, 3 Sneed, Tenn. 196; *James v. Fulcrod*, supra; *Bellows v. Russell*, 20 N. H. 427; *Kearney v. Taylor*, 15 How. U. S. 494; *Smith v. Greenlee*, 2 Dev. 126; *Switzer v. Skiles*, 3 Gilman, 529; *Goode v. Hawkins*, 2 Dev. Eq. 393; *Hunt v. Elliott*, 80 Ind. 245; *Maffet v. Ijams*, 7 Out. Pa. 266; *Morrison v. Darling*, 47 Vt. 67; *Marie v. Garrison*, 83 N. Y. 14; *Danielwitz v. Sheppard*, 62 Cal. 339; *Mathews v. Starr*, 68 Ga. 521; *Smith v. Ullman*, 58 Md. 183.

⁵ *Bishop Stat. Crimes*, § 844-966.

is, that the law differs more or less in our States, and that one who would properly understand it must study the statutes of his own State in connection with the doctrines laid down in such books as the present one.

§ 530. **Wager — (Bet).**— A wager is an agreement between parties, differing as to an uncertain fact¹ or forecast of a future event, that, on the transpiring of what will disclose the truth, a designated sum of money or other thing shall be transferred from the one who is found to be in the wrong to the other who is ascertained to be in the right.² It implies risk on both sides,³ yet not necessarily equal;⁴ so that, for example, the offering of money on a trial of the speed of horses is not a wager.⁵ The term “bet” is nearly of the same meaning,⁶ yet less nicely technical. Another difference, not always observed, may be, that, while wager denotes the contract, bet indicates the thing contracted for.⁷ Now, as to the —

§ 531. **Common Law of Wager.**— In England, from the early times to the present, when no statute has interfered, the courts have deemed it a part of their high functions to enforce all sorts of wagers, except those “which,” in the words of Grose, J., “by injuring a third person disturb the peace of society, or which militate against the morality or sound policy of the kingdom.”⁸ For example, it was adjudged to be within the “sound policy of the kingdom” for the Court of King’s Bench to serve as a sort of stakeholder between two persons who had made a bet whether or not another person had bought of a fourth a wagon.⁹ And that great light of the law, Lord Mansfield, presiding over the tribunal of Geo. III., received the evidence and directed the

¹ *Good v. Elliott*, 3 T. R. 693; *Pugh v. Jenkins*, 1 Q. B. 631.

² For other definitions, see *Bouv. Law Dict. Wager*; *Merchants Savings, &c. Co. v. Goodrich*, 75 Ill. 554; *Hampden v. Walsh*, 1 Q. B. D. 189, 192.

³ *Quarles v. The State*, 5 Humph. 561; *Fisher v. Waltham*, 4 Q. B. 889, 898; *Jordan v. Kent*, 44 How. Pr. 206.

⁴ *Bishop Stat. Crimes*, § 871; *Bates v. Clifford*, 22 Minn. 52.

⁵ *Delier v. Plymouth, &c. Soc.* 57

Iowa, 481; *Alvord v. Smith*, 63 Ind. 58, 62, 63.

⁶ *The State v. Welch*, 7 Port. 463; *Woodcock v. McQueen*, 11 Ind. 14; *Shumate v. Commonwealth*, 15 Grat. 653.

⁷ *Bishop Stat. Crimes*, § 870, 871.

⁸ *Good v. Elliott*, 3 T. R. 693, 695; *Da Costa v. Jones*, Cowp. 729; *Ramloll Thackoorseydass v. Soojumnul Dhondmull*, 6 Moore P. C. 300, 310.

⁹ *Good v. Elliott*, supra.

jury on the question, which was the subject of a wager between the parties, whether a third person, who wore the clothes and bore the name of a man, was really a male or a female! The jury determined that it was a woman. "This case," said his lordship, on a subsequent hearing before the full bench, "made a great noise all over Europe; and, soon afterwards, I own I was sorry." So it was unanimously decided that the "morality and sound policy of the kingdom" do not require the tribunals to employ themselves in enforcing this kind of wager.¹ In our country, some courts have followed the English doctrine, while others² have held that no wagers are recoverable.³ If we look at this question in the light of reason, divested of the prejudices which judicial precedent has draped around it, we shall see that a wager has no legitimate connection with any affair of life. It is merely a plan by which one man gains and another loses money or its value, without any real consideration, or any benefit to the individual or the community. And on a just view of things, a judge would better serve the State, and more adorn his office, to go round with blacking and brush "shining" the boots of the officers of his court, than to sit on the bench enforcing a wager. As to the —

§ 532. **Consideration for Wager.** — It seems to have been taken for granted that the mutual promises⁴ of the wagering parties satisfy the law's requirement of a consideration.⁵ But any one who will suffer his mind fully to grasp the question, and examine it distinctly, will see that it does not. The mutual promises which constitute mutual considerations are those wherein each party stipulates to bestow something of value on the other in exchange for what he receives; of such sort that, on its being given or tendered by one of

¹ *Da Costa v. Jones*, supra. Later, the statute of 8 & 9 Vict. c. 109, § 18, has made all wagers in England void. *Hampden v. Walsh*, 1 Q. B. D. 189, 192.

² For example, *Winchester v. Nutter*, 52 N. H. 507; *Ball v. Gilbert*, 12 Met. 397, 399.

³ Met. Con. 239. And see *Wilkin-*

son v. Tousley, 16 Minn. 299; *Hill v. Kidd*, 43 Cal. 615; *Merchants Savings, &c. Co. v. Goodrich*, 75 Ill. 554; *Boughner v. Meyer*, 5 Colo. 71; *Gridley v. Dorn*, 57 Cal. 78; *Bishop Stat. Crimes*, § 848.

⁴ Ante, § 76-79.

⁵ *Jackson v. Colegrave*, Carth. 338.

them, and not otherwise, he will be entitled to maintain a suit against the other for breach of the latter's promise. And, except in these wagering contracts, it was never heard of in the law, that the one party could maintain an action on the other's promise, unless he had first done or tendered something, or there was an outstanding promise which the other could at some time enforce. Now, where A tells B that he will give him a dollar if Miss W. applied a brush to her teeth yesterday morning, but nothing if she did not; in response to which, B says he will give A a dollar if she left her teeth uncleansed, yet nothing otherwise, — a wager evidently "not against public policy," if there are any which are not, — either of these parties, who may afterward appear by the proofs to be in the right, may, on the very theory which holds these contracts to be founded on a consideration, instantly, without tendering anything, or performing anything, or leaving any liability against himself, sue the other for his dollar. Where now is the consideration? If there was any at first, it has failed; ¹ for we have sifted the whole transaction, and not a particle of it appears. True, there was a promise from each to the other; but it was of such sort that, when one was called upon to perform, the other's promise had vanished, and it could not remain as the consideration for the promise of him from whom performance was demanded. In other words, the promise of each was to make, on the transpiring of a condition, a gift to the other, not enforceable; ² not only were the two promises not so connected ³ as to render the one a consideration for the other, but their express terms exclude such a construction. By these terms, if the fact is one way, A is to give B a dollar; if the other way, B is to bestow a dollar on A; but, in neither alternative, has the dollar of the one, or the promise of it, any possible connection with the dollar or promise of the other.

§ 533. **Gaming.** — not necessarily, but often or commonly, includes a wager as one of its elements. In it, "by a bet,

¹ Ante, § 71.

² Ante, § 77, 82.

³ Ante, § 88.

by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is, as the conclusion of premises agreed, to be transferred from a loser to a winner.”¹ In a sort of general way it is, at least under our statutes, deemed unlawful, and the contract void.² The principles governing this sort of question already appear in the present chapter; and the whole subject, in its criminal aspect, has been elucidated by the author in another work.³ Considering that the statutes greatly differ in our States, that expositions of provisions not before both writer and reader are unsatisfactory if not misleading, and that every practitioner will be obliged to consult the enactments and decisions of his own State, it is deemed best to extend this sub-title but a little further.

§ 534. “**Margins**” — “**Options**.” — By common consent, all bargains for the purchase and sale of things—for example, stocks and commodities—where it is the understanding of the parties, whether expressed or not, that the things are not to be delivered, but at the agreed time the “differences” between their market values at the two periods are to be adjusted, and all other transactions of this nature, are illegal or against public policy, to the extent that the courts will not enforce them.⁴ These are all gambling contracts, disturbing the courses of trade, and not tolerated by the law.⁵ But a sale, in good faith, for future, actual delivery is valid,⁶ even though, at the time of the sale, the seller has not the article in possession.⁷

¹ Bishop Stat. Crimes, § 858.

² *Da Costa v. Jones*, Cowp. 729, 735.

³ Bishop Stat. Crimes, § 844-966.

⁴ *Irwin v. Williar*, 110 U. S. 499; *Hentz v. Jewell*, 4 Woods, 656; *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Melchert v. American Union Tel.* 3 McCrary, 521; *Tenney v. Foote*, 4 Bradw. 594; *Williams v. Tiedemann*, 6 Misso. Ap. 269; *Webster v. Sturges*, 7 Bradw. 560; *Beveridge v. Hewitt*, 8 Bradw. 467; *Story v. Salomon*, 71 N. Y. 420.

⁵ *Pickering v. Cease*, 79 Ill. 328; *Rumsey v. Berry*, 65 Maine, 570; *Wat-*

erman v. Buckland, 1 Misso. Ap. 45; *Barnard v. Backhaus*, 52 Wis. 593; *Lowry v. Dillman*, 59 Wis. 197; *Rudolf v. Winters*, 7 Neb. 125; *Dickson v. Thomas*, 1 Out. Pa. 278; *Hawley v. Bibb*, 69 Ala. 52; *Yerkes v. Salomon*, 11 Hun, 471; *Bigelow v. Benedict*, 16 Hun, 429; *North v. Phillips*, 8 Norris, Pa. 250.

⁶ *Cole v. Milmine*, 88 Ill. 349; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Rumsey v. Berry*, 65 Maine, 570; *Pixley v. Boynton*, 79 Ill. 351.

⁷ *Gregory v. Wendell*, 40 Mich. 432. See *Mann v. Bishop*, 136 Mass. 495.

§ 535. **Aiding — (Loans — Other Contracts in Aid).** — One who assists another in a violation of law is himself a violator.¹ Therefore a loan for the purpose of making a “corner,”² or for betting on a game,³ or a deposit as a “margin,”⁴ or the price of land sold to be subdivided and disposed of as prizes in an unlawful lottery,⁵ or the promised entrance fee to an exhibition where the mutual purpose of the parties is to enable the one to engage in an unlawful horse-race conducted by the other,⁶ or the value of services in training a horse for an unlawful race,⁷ or of a sewing-machine held under an unlawful lottery ticket,⁸ cannot be recovered by suit. And it is the same of all the multitudinous other cases⁹ which are within the principle of these.

VIII. *Contracts violative of the Lord's Day.*

§ 536. **How at Common Law.** — Under the common law, the Lord's day, or Christian Sabbath, is a non-judicial day.¹⁰ And there are nuisances indictable by reason of being com-

¹ 1 Bishop Crim. Law, § 628, 629.

² Raymond v. Leavitt, 46 Mich. 447.

³ Peck v. Briggs, 3 Denio, 107; Ruckman v. Bryan, 3 Denio, 340; White v. Buss, 3 Cush. 448; McKinnell v. Robinson, 3 M. & W. 434; Cannan v. Bryce, 3 B. & Ald. 179.

⁴ Gregory v. Wendell, 39 Mich. 337.

⁵ Hooker v. De Palos, 28 Ohio State, 251, 256. Compare with Rose v. Mitchell, 6 Colo. 102, where the learned court deems the better doctrine to be, that, for the seller to be barred of his recovery, it is not sufficient for him to know of the unlawful purpose, he must participate in the buyer's unlawful act, or intentionally aid him therein. And see McGavock v. Puryear, 6 Coldw. 34. The answer to which view is, that one who sells a thing, knowing it to be bought for an unlawful use, does participate in such use. A druggist, for example, who furnishes arsenic to one whom he knows to be buying it to murder his wife therewith, becomes a participant in the murder if it takes place; or, if it does not

take place, a participant in the criminal misdemeanor of procuring the arsenic with the murderous intent. And see Tatum v. Kelley, 25 Ark. 209. Compare also with Kittle v. De Lamater, 4 Neb. 426; Mosher v. Griffin, 51 Ill. 184; Oxford Iron Co. v. Spradley, 51 Ala. 171, 175; Wallace v. Lark, 12 S. C. 576; post, § 547.

⁶ Comly v. Hillegass, 13 Norris, Pa. 132, 138.

⁷ Mosher v. Griffin, 51 Ill. 184. See Harris v. White, 81 N. Y. 532.

⁸ Funk v. Gallivan, 49 Conn. 124.

⁹ For example, Lowe v. Young, 59 Iowa, 364; In re Green, 7 Bis. 338; Colderwood v. McCrea, 11 Bradw. 543; Higginson v. Simpson, 2 C. P. D. 76; Beeston v. Beeston, 1 Ex. D. 13; Williamson v. Baley, 78 Misso. 636; Baldwin v. Flagg, 9 Stew. Ch. 48.

¹⁰ 1 Bishop Crim. Proc. § 207; Swann v. Broome, 1 W. Bl. 526, 531, 3 Bur. 1595; Story v. Elliot, 8 Cow. 27; Mackalley's Case, 9 Co. 65 b, 66 b.

mitted on this day,¹ while yet no single act of Sabbath-breaking is a crime. The common law would not have been inconsistent with itself if it had held the more reprehensible sorts of bargaining to be against public policy when conducted on the Lord's day, but the author has discovered nothing of this in the books; and, as general doctrine, it is abundantly settled that a Sunday contract is good when it does not come in conflict with any statute.² Hence, —

§ 537. **Under Statutes.** — The statutes, differing considerably in our States, and not exactly following in their terms the English ones, constitute the sole basis of the invalidity of Sunday contracts. The principles on which they operate to this end were stated in the opening part of this chapter.³ Any act of contracting which is within the penalties of these statutes,⁴ and any executory contract the consideration for which is something unlawfully done on the Lord's day,⁵ is void. In another work, the author has explained these statutes in their criminal aspect, and to some degree in their civil, and to it he refers the reader.⁶ The caution, often repeated, applies here, that the practitioner should consult the particular statutory terms and adjudications of his own State.

§ 538. **"Ordinary Calling."** — Under a statute forbidding persons to do on the Lord's day what is within their "ordinary calling," a contract of sale of goods, made by one who does not carry on the business of selling, is valid.⁷ And so is

¹ 2 Bishop Crim. Law, § 965; Bishop Dir. & F. § 662.

² Bloom v. Richards, 2 Ohio State, 387; Batsford v. Every, 44 Barb. 618; Rex v. Whitnash, 7 B. & C. 596; Drury v. Defontaine, 1 Taunt. 131; Richmond v. Moore, 107 Ill. 429; Horacek v. Keebler, 5 Neb. 355; More v. Clymer, 12 Misso. Ap. 11; Hellams v. Abercrombie, 15 S. C. 110.

³ Ante, § 471, 472.

⁴ Chestnut v. Harbaugh, 28 Smith, Pa. 473; Pike v. King, 16 Iowa, 49; Sayre v. Wheeler, 31 Iowa, 112; Tucker v. West, 29 Ark. 386; Clough v. Goggin, 40 Iowa, 325; Sayre v. Wheeler, 32 Iowa, 559; Hussey v. Roquemore, 27

Ala. 281; Hill v. Sherwood, 3 Wis. 343; Love v. Wells, 25 Ind. 503; Pattee v. Greely, 13 Met. 284; Merriam v. Stearns, 10 Cush. 257; Sellers v. Dugan, 18 Ohio, 489; Fennell v. Ridler, 5 B. & C. 406.

⁵ Slade v. Arnold, 14 B. Monr. 287; Morgan v. Bailey, 59 Ga. 683.

⁶ 2 Bishop Crim. Law, § 950-970.

⁷ Drury v. Defontaine, 1 Taunt. 131; Merritt v. Earle, 31 Barb. 38; Sanders v. Johnson, 29 Ga. 526; Kaufman v. Hamm, 30 Misso. 387; Allen v. Gardiner, 7 R. I. 22; Moore v. Murdock, 26 Cal. 514; Mills v. Williams, 16 S. C. 593.

a mortgage¹ or promissory note,² executed on Sunday, in a transaction outside of the maker's "ordinary calling."

§ 539. "**Common Labor**" — is the term in some of the statutes, and there are differences of judicial opinion as to what contracts are within it.³ A Sunday contract is not such "labor" as "disturbs the peace and good order of society."⁴

§ 540. "**Labor, Business, Work**" — are explained in the other book mentioned.⁵ Affixing one's name to a bond is "business,"⁶ so is the loaning of money.⁷ The driving of a street-railway car is "labor."⁸ These statutes commonly except what is done from —

§ 541. "**Necessity or Charity**," — explained also in the other work.⁹ So that, if a contract within the general inhibition is made from "necessity" or from "charity," it is good;¹⁰ otherwise, not.¹¹

§ 542. **Ratification — New Contract.** — The void Sunday contract is sometimes spoken of by the courts as susceptible of "ratification" on a subsequent week-day.¹² But the better form of expression is, that, as it is void and not voidable, there can be no technical ratification of it;¹³ yet a new contract, express or implied, may be made on the same subject, as though nothing had been done on Sunday.¹⁴ At the same

¹ *Hellams v. Abercrombie*, 15 S. C. 110. And see 2 Bishop Crim. Law, § 957, 958.

² *Sanders v. Johnson*, 29 Ga. 526.

³ 2 Bishop Crim. Law, § 954.

⁴ *Richmond v. Moore*, 107 Ill. 429.

⁵ 2 Bishop Crim. Law, § 956.

⁶ *De Forth v. Wisconsin, &c. Railroad*, 52 Wis. 320.

⁷ *Troewert v. Decker*, 51 Wis. 46.

⁸ *Day v. Highland Street Railway*, 135 Mass. 113.

⁹ 2 Bishop Crim. Law, § 959, 960.

¹⁰ *Stewart v. Davis*, 31 Ark. 518; *Philadelphia, &c. Railroad v. Lehman*, 56 Md. 209, 226; *Aldrich v. Blackstone*, 128 Mass. 148.

¹¹ *Whelden v. Chappel*, 8 R. I. 230; *Anonymous*, 12 Abb. N. Cas. 458.

¹² *Tucker v. West*, 29 Ark. 386; *Har-*

rison v. Colton, 31 Iowa, 16; *Smith v. Case*, 2 Oregon, 190; *Perkins v. Jones*, 26 Ind. 499; *Banks v. Werts*, 13 Ind. 203; *Wilson v. Milligan*, 75 Misso. 41; *Kuhns v. Gates*, 92 Ind. 66.

¹³ *Post*, § 614.

¹⁴ *Day v. McAllister*, 15 Gray, 433; *Ladd v. Rogers*, 11 Allen, 209; *Bradley v. Rea*, 14 Allen, 20; *Tucker v. West*, *supra*; *Meriwether v. Smith*, 44 Ga. 541; *Ryno v. Darby*, 5 C. E. Green, 231; *Finn v. Donahue*, 35 Conn. 216; *Pate v. Wright*, 30 Ind. 476; *Bradley v. Rea*, 103 Mass. 188; *Butler v. Lee*, 11 Ala. 885; *Rainey v. Capps*, 22 Ala. 288; *Pope v. Linn*, 50 Maine, 83; *Reeves v. Butcher*, 2 Vroom, 224; *Kountz v. Price*, 40 Missis. 341; *Williams v. Paul*, 6 Bing. 653; *Simpson v. Nicholls*, 3 M. & W. 240, 244; *Van Hoven v. Irish*, 3

time, the Sunday transaction will in some circumstances render a new contract practically difficult or impossible. Thus it has been held that, if money is borrowed on Sunday, — a transaction which, it appears, vests the ownership in the borrower,¹ — the law will create in favor of the lender no promise of repayment.² Nor, it has been further held, will any express promise of repayment, made afterward, avail the lender. The loan is gone.³ But, where one makes on Sunday a void promise to pay to another a specific indebtedness, there may still be a recovery on the original transaction.⁴

§ 543. **Date** — (**Third Persons**). — The dating of a contract on a week-day, when it is really executed on Sunday, does not render it valid.⁵ Still, in favor of an innocent party, an indorsee, assignee, or other person sustaining a like relation will, if he *bona fide* and for a valuable consideration acquires his interest on a week-day, hold the contract as good.⁶ Nor, if entered into on a week-day, is it ill because dated or to be performed on Sunday,⁷ unless something unlawful is then to be done.⁸

§ 544. **Delivery**. — As the efficacy of a legal instrument is imparted by its delivery, the contract may be good though

McCrary, 443; Rosenblatt v. Townsley, 73 Misso. 536; Winfield v. Dodge, 45 Mich. 355.

¹ Post, § 545.

² Troewert v. Decker, 51 Wis. 46.

³ Meader v. White, 66 Maine, 90. I am not quite sure that all courts will hold the law in this way. See the cases cited in previous notes to this section. And that parties to an illegal contract may recede therefrom and place themselves in *statu quo*, ante, § 489. The right to rely on the illegality of the Sunday contract comes from the law; and we have seen the doctrine to be, that one may waive, by his promise, and without a fresh consideration, a defence which the law has given him. Ante, § 94-98. Why, then, may not the borrower, on a week-day, when his act is valid, waive the defence of the Sunday invalidity, and, by a promise of payment, bind himself to do what honesty demands?

The Wisconsin court held, that, if on Sunday goods are sold on credit and delivered, then on a secular day the purchaser promises to pay for them, the latter promise can be enforced. Melchoir v. McCarty, 31 Wis. 252.

⁴ Sayre v. Wheeler, 31 Iowa, 112. See Miller v. Lynch, 38 Missis. 344.

⁵ Ante, § 178; Heller v. Crawford, 37 Ind. 279; Parker v. Pitts, 73 Ind. 597.

⁶ Evansville v. Morris, 87 Ind. 269; Leightman v. Kadetska, 58 Iowa, 676; Johns v. Bailey, 45 Iowa, 241; Begbie v. Levy, 1 Tyrw. 130; Heise v. Bumpass, 40 Ark. 545. See Dillingham v. Blood, 66 Maine, 140.

⁷ Stacy v. Kemp, 97 Mass. 166; Aldridge v. Decatur Branch Bank, 17 Ala. 45; Lamore v. Frisbie, 42 Mich. 186.

⁸ Smith v. Wilcox, 24 N. Y. 353.

written and signed on Sunday, if delivered on another day. But a promissory note signed by two makers on Sunday, and on a week-day delivered by one of them, will not bind the other maker, for the Sunday authorization to deliver it was void.²

§ 545. **Executed.** — When a Sunday contract has been executed, — that is, performed, — money paid and goods transferred under it cannot be recovered back.³ It is so even of a deed of land into which the grantee has entered; the courts will not interfere with his possession.⁴

§ 546. **Sunday Payment.** — Money paid on Sunday in discharge of a debt, and retained afterward, is effectual for the purpose.⁵

IX. *Contracts contrary to the Statutes in Regulation of Business.*

§ 547. **In Brief.** — The doctrines of the last sub-title are applicable to this. And the rule is, that, when a statute forbids a particular business generally, or to unlicensed persons, any contract made in such business by one not authorized, or made with the view of violating the statute, is void.⁶ Within

¹ *Prather v. Harlan*, 6 Bush, 185; *Dohoney v. Dohoney*, 7 Bush, 217; *Sherman v. Roberts*, 1 Grant, Pa. 261; *Goss v. Whitney*, 24 Vt. 187; *Hilton v. Houghton*, 35 Maine, 143. See *McCalop v. Hereford*, 4 La. An. 185; *Bryant v. Booze*, 55 Ga. 438; *Tucker v. Hinkley*, 9 Allen, 452; *Dickinson v. Richmond*, 97 Mass. 45; *Stackpole v. Symonds*, 3 Fost. N. H. 229; *Clough v. Davis*, 9 N. H. 500; *Gibbs & Co. Manuf. Co. v. Brucker*, 111 U. S. 597; *King v. Fleming*, 72 Ill. 21; *The State v. Young*, 23 Minn. 551; *Hall v. Parker*, 37 Mich. 590.

² *Davis v. Barger*, 57 Ind. 54.

³ Ante, § 509 and note; post, § 627; *Chestnut v. Harbaugh*, 28 Smith, Pa. 473; *Finn v. Donahue*, 35 Conn. 216; *Uhler v. Applegate*, 2 Casey, Pa. 140;

Greene v. Godfrey, 44 Maine, 25; *Shuman v. Shuman*, 3 Casey, Pa. 90; *Kinney v. McDermot*, 55 Iowa, 674. But see *Tucker v. Mowrey*, 12 Mich. 378; *Smith v. Bean*, 15 N. H. 577; *Sumner v. Jones*, 24 Vt. 317; *Brazee v. Bryant*, 50 Mich. 136.

⁴ *Ellis v. Hammond*, 57 Ga. 179.

⁵ *Johnson v. Willis*, 7 Gray, 164; *Lamore v. Frisbie*, 42 Mich. 186.

⁶ *Langton v. Hughes*, 1 M. & S. 593; *Decell v. Léwenthal*, 57 Missis. 331; *Anding v. Levy*, 57 Missis. 51; *Melchoir v. McCarty*, 31 Wis. 252; *Johnson v. Hulings*, 7 Out. Pa. 498; *Tedrick v. Hiner*, 61 Ill. 189; *Solomons v. Chesley*, 58 N. H. 238; *Walker v. United States*, 106 U. S. 413; *Creekmore v. Chitwood*, 7 Bush, 317; *Hubbell v. Flint*, 13 Gray, 277.

this principle, is a sale of goods to be used in the business, from one who has knowledge of the proposed use.¹

§ 548. *Elsewhere.* — The various statutes of this sort — particularly those which regulate liquor selling,² hawking and peddling,³ dealing as a merchant,⁴ and some other like things⁵ — are considered by the author in his “Statutory Crimes.” Something there will be found as to the contract.⁶

§ 549. *The Doctrine of this Chapter restated.*

The law, for convenience, for adaptation to our infirmities, and to some degree from necessity, has, besides its doctrines of fundamental right, rules more or less technical, and a policy of the like sort. So it must refuse to enforce, or in other words it must hold void, contracts which violate such rules or policy. *A fortiori*, it cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn — or in evasion of — what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all, detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all, made to promote what a statute has declared to be wrong, — are void. If a court should enforce them, it would employ its functions in undoing what it was established to do. The act would be in the nature of suicide.

¹ Ante, § 535; *Langton v. Hughes*, supra; *Tolman v. Johnson*, 43 Iowa, 127; *Glass v. Alt*, 17 Kan. 444. See *Dillingham v. Blood*, 66 Maine, 140.

² Bishop Stat. Crimes, § 983-1070 b.

³ Ib. § 1071-1088.

⁴ Ib. § 1090-1092.

⁵ Ib. § 1093-1098.

⁶ Particularly at § 1030, 1031.

CHAPTER XIX.

THE CONSTITUTIONAL PROTECTION OF THE OBLIGATION OF CONTRACTS.

§ 550. Introduction.

551-554. General Doctrine.

555-564. Parties and Contract.

565, 566. Laws under which Contract made.

567-575. Laws impairing or not.

576. Doctrine of Chapter restated.

§ 550. **How Chapter divided.** — We shall consider, I. The General Doctrine; II. The Parties and the Contract; III. The Laws under which the Contract is made; IV. Subsequent Laws as impairing or not the Obligation.

I. *The General Doctrine.*

§ 551. **The Provision.** — The Constitution of the United States binds the States, not the United States,¹ by the provision that “no State shall . . . pass any . . . law impairing the obligation of contracts.”² Upon this —

§ 552. **Nature of Adjudications.** — There have been multitudes of adjudications in the State tribunals, and enough in those of the United States to render the doctrines in the main settled. The ultimate authority in these cases, to which the courts of the States are required to yield, is in the Supreme Court of the United States;³ so that no decisions in conflict with those of this tribunal are in force. From the first, the

¹ *Evans v. Eaton*, Pet. C. C. 322.*v. Putnam*, 3 Gray, 551, 554; *Boyle v.*² Const. U. S. art. 1, § 10.*Zacharie*, 6 Pet. 635.³ *Bishop Written Laws*, § 35 b; *Marsh*

great importance and wide effect of this provision were recognized, judges have expounded it with multitudes of words, there have been many dissenting opinions, and the *dicta* are a wilderness of entanglement, of discord, and of contradiction. Still, on the whole, the results are such as, on a review, are found to accord with sound reason and common sense. In the nature of things, it would have been impossible that absolutely nothing should be adjudged by the tribunal of last resort contrary to reason.

§ 553. **How in this Chapter.** — A work so condensed as the present could not, whatever its author might desire, travel anew over the sinuous ways of past argumentation. Nor can it profitably refer to everything found in the reports relating to each particular question; but, by the help of the digests, the reader can readily supply for himself the omissions, whether of cases or of adjudged points. We shall, therefore, endeavor to forget that the subject is one of vast magnitude, and take a condensed view of it in the simpler light of such common sense as God has supplied for the occasion.

§ 554. **Doctrine defined.** — The doctrine derivable from the provision under consideration is, that, whenever a contract, between whatever parties, and on whatever subject, has been entered into, the mutual obligations which the law with reference whereto it was made imposed on the parties, cannot be cast off or diminished by any subsequent enactment in the same State, or any enactment in any other; while yet the State legislatures are at liberty to modify at will the remedies, but not in a manner or degree to impair the obligation itself. More minutely, —

II. *The Parties and the Contract.*

§ 555. **Parties.** — Contracts between any parties capable of binding themselves are within this provision;¹ as, between two individuals,² between corporations or a corporation and

¹ *Green v. Biddle*, 8 Wheat. 1.

² *Hills v. Carlton*, 74 Maine, 156; *Holt v. Patterson*, 74 N. C. 650.

an individual,¹ between two States,² between a State and an individual or corporation.³

§ 556. **What Contracts.** — It is believed that the word “contracts,” in this provision, is employed in its wide meaning; for example, as including even judgments.⁴ And the reason is, that there is no principle to justify interpretation in distinguishing classes with regard thereto. In the Statute of Frauds and other like statutes, we have seen, the word denotes the actual contract and no more, not extending to that created by law.⁵ This is because only actual contracts are within the dangers which those statutes were enacted to avoid; and it would do violence to the legislative purpose, and work a partial defeat of the law itself, to extend them to created contracts. But there is no ground of reason for making a like distinction under the constitutional provision now in contemplation; so that, in just principle, on a question little illumined by decisions, though constitutions are interpreted similarly to statutes,⁶ this provision should be held to protect as well the bargains which the law makes for men as those which they construct for themselves.⁷ Again, —

§ 557. **Executory and Executed.** — This guaranty is, for the like reason, construed to extend equally to executory and to executed contracts;⁸ yet to nothing which, by whatever name called, the law does not recognize as a contract. For example, the executory agreement to marry is undoubtedly within the protection of this provision; but the executed agreement — that is, the marriage — is, though commonly spoken of in the older books and sometimes in the later as a contract, not such in fact, therefore to the status of marriage

¹ *Gilfillan v. Union Canal*, 109 U. S. 401; *Louisiana v. St. Martin's Parish*, 111 U. S. 716; *Hovelman v. Kansas City Horse Railroad*, 79 Misso. 632.

² *Green v. Biddle*, *supra*; *Spooner v. McConnell*, 1 McLean, 337.

³ *Fletcher v. Peck*, 6 Cranch, 87; *Terrett v. Taylor*, 9 Cranch, 43; *Pawlet v. Clark*, 9 Cranch, 292; *Hart v. Lamphire*, 3 Pet. 280.

⁴ *Ante*, § 141; *Gunn v. Barry*, 15

Wal. 610; *Moser v. White*, 29 Mich. 59; *O'Brien v. Young*, 95 N. Y. 428.

⁵ *Ante*, § 191-199.

⁶ *Bishop Written Laws*, § 92.

⁷ See *Story Const.* § 1377.

⁸ *Farrington v. Tennessee*, 95 U. S. 679, 683; *Green v. Biddle*, 8 Wheat. 1; *Fletcher v. Peck*, 6 Cranch, 87, 137; *Dartmouth College v. Woodward*, 4 Wheat. 518, 641, 651.

this constitutional provision gives no protection.¹ So, on the other hand, there are various executory agreements which the law refuses to carry into effect — as, for example, those without consideration — made valid by being executed. An illustration of this is a gift, which, while a mere promise, is of no effect, but it becomes good on the thing being delivered.² It is believed that this constitutional protection embraces every class of executed contracts which the law holds to be valid, however and on whatever ground invalid while executory; though not every question within this doctrine has been adjudged.³ But —

§ 558. **Vested.** — The mere fact that a right has become vested does not bring it within the protection we are considering; to be so, it must have come by contract.⁴

§ 559. **Corporation Franchise.** — A corporation is an artificial creation of the law, embodying a part of the legal capabilities and responsibilities of an unincorporate man.⁵ It is often spoken of in the books as “immortal.” But this means only that it has “the capacity of perpetual succession,” to quote from Kent;⁶ or, as Blackstone expresses it, that it “*may endure forever* ;”⁷ in other words, that it does not die with the individual corporators. Still, by the common law, as it came with our forefathers from England, it might be put an end to by a statute, by the death of all its members in certain cases, by the surrender of its franchise, or by forfeiture of its charter.⁸ It is the province of a creator to bring death to the thing created; so does God to man, and so in reason can the legislative power to the corporation to which it has given existence. Never did one, standing by the death-bed of his dying friend, accuse God of having broken a “contract.” But the doctrine has widely permeated our judicial decisions

¹ 1 Bishop Mar. & Div. § 3, 8, 665-669.

² Ante, § 82; *Farrington v. Tennessee*, supra.

³ Consult and compare *Bonaparte v. Camden, &c. Railroad*, Bald. 205; *Vincennes University v. Indiana*, 14 How. U. S. 268; *Farrington v. Tennessee*, supra.

⁴ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 539, 540; *Florentine v. Barton*, 2 Wal. 210.

⁵ 1 Bishop Crim. Law, § 417.

⁶ 2 Kent Com. 267.

⁷ 1 Bl. Com. 484.

⁸ 1 Bl. Com. 485; 2 Kent Com. 305.

that, as to private corporations, such as those for establishing banks, railroads, institutions of learning, private charities, and the like, the act of incorporation is, after acceptance by the corporators, a contract, which can be neither modified nor taken away except by their consent.¹ In just principle, it should be treated as being in fact, what on its face it is, a law, subject to repeal like any other law, yet, during its continuance, providing special rules, differing more or less from the general ones, under which the corporators are permitted to conduct a designated business. If, in such business, they make a contract, it is protected from violation by our constitutional guaranty;² but, in reason, the incorporating act may be repealed, whereupon the affairs of the corporation must be closed and the effects distributed, just as the transactions of a man may be put an end to by death, when his estate will be settled up. Whether or not the legislature has also the power to modify the act of incorporation against the will of the corporators is a somewhat different question; but, if the act itself is not a contract, it is difficult to say that its legislative modification violates the nonentity of a non-existing contract, whatever else it does. And there are cases which, on one form of reasoning or another, give strength to this view.³ Moreover, as fundamental doctrine, dwelling in the nature of things, one legislature cannot bind a future one;⁴ therefore, should even the incorporating act declare itself irrevocable, thus endeavoring to become the rule of action for the corporators to the end of time, this declaration would be a nullity because made without authority. Hence, even if we begin by assuming the incorporating

¹ *Michigan State Bank v. Hastings*, 1 Doug. Mich. 225; *Commercial Bank v. The State*, 6 Sm. & M. 599; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Providence Bank v. Billings*, 4 Pet. 514; *State Bank v. Knoop*, 16 How. U. S. 369; *Dodge v. Woolsey*, 18 How. U. S. 331; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *The Binghamton Bridge*, 3 Wal. 51; *Young v. Harrison*, 6 Ga. 130; *People v. Manhattan Co.* 9 Wend. 351.

² *Vincennes University v. Indiana*, 14 How. U. S. 268; *Curran v. Arkansas*, 15 How. U. S. 304.

³ *Mechanics, &c. Bank v. Debolt*, 1 Ohio State, 591, 598; *Toledo Bank v. Toledo*, 1 Ohio State, 622; *The State v. Southern, &c. Railroad*, 24 Texas, 80. And see *Spring Valley Water-works v. Schottler*, 110 U. S. 347.

⁴ *Bishop Written Laws*, § 31, 147.

act to be within the constitutional protection, we next find its assumed stipulation of irrevocability to be void as contrary to the nature of things, — an obstacle which a written constitution is equally powerless with a statute to overcome. Or, if we do not press this argument so far, it teaches us that the constitution should not be construed as attempting to subvert, in this instance, the nature of things. Still, —

§ 560. **Reservation of Power.** — If we assume that the act of incorporation is a contract, its exemption from repeal or modification will not exist where the act itself, or a clause in the constitution or statutes of the incorporating State, declares it to be subject thereto.¹ As this sort of contract, like any other, survives all changes of government,² and as we hope for the continued life of the Constitution of the United States, many of our State legislatures have taken advantage of this principle to protect future generations, and even their own, from what may prove to be intolerable burdens. No one can foresee with what tenacity judicial error may be adhered to in the future; and, if it is really and perpetually true that any foolish legislature can bind the people of their State forever, so that neither a new constitution nor a statute can disintrall them, — if it can create an artificial monster which no power can ever thereafter slay, — it is but the highest wisdom, even higher than that from which this clause in the Constitution of the United States proceeded, to do what can be done to avert the terrible consequence. Happily, —

§ 561. **Public Corporations.** — It is uniformly held that the foregoing doctrine does not extend to acts creating corporations “for public purposes only, such as cities, towns, parishes, and other public bodies.”³ The legislature may, at will,

¹ *Greenwood v. Freight Co.* 105 U. S. 13; *Sherman v. Smith*, 1 Black, 587; *Delaware Railroad v. Tharp*, 5 Harring. Del. 454; *Bangor, &c. Railroad v. Smith*, 47 Maine, 34; *The State v. Person*, 3 Vroom, 134; *In re Lee & Co.'s Bank*, 21 N. Y. 9; *Commonwealth v. Fayette County Railroad*, 5 Smith,

Pa. 452; *Wales v. Stetson*, 2 Mass. 143, 146.

² *Dartmouth College v. Woodward*, 4 Wheat. 518.

³ Story Const. § 1393, referring to *Terrett v. Taylor*, 9 Cranch, 43, 52; *Dartmouth College v. Woodward*, 4 Wheat. 518, 663, 694.

create, modify, or abolish such corporations.¹ But contracts made by them are protected like any other.²

§ 562. **Governmental Officers** — are not, as we have seen, within the protection of this provision in respect of their offices and salaries.³

§ 563. **Contracts by State** — (**Grants** — **Taxation**). — Though, in just principle, yet contrary to the usual course of adjudication, a private act of incorporation is not a contract,⁴ still, both in reason and on authority, a State is competent to enter into contracts, the obligation whereof it cannot impair.⁵ Of this sort, for example, is a grant of lands.⁶ And it is the same of a provision in the grant that the lands shall not be taxed.⁷ So also a State may, for a valuable consideration, surrender other rights of taxation.⁸ But a mere special statute exempting certain property is not a contract, and it may be repealed at the legislative pleasure.⁹ It has been questioned, with great force of reasoning, whether a State legislature has the power thus to surrender its right of taxation, so as to bind future legislatures, but the decisions are as just stated. Beyond this, —

§ 564. **Police Power of State**. — It is settled, as well on authority as in reason, that a legislature cannot bind its successors to forbear the exercise of those governmental functions which they may deem needful to preserve the good order, happiness, health, or morality of the people.¹⁰ So that,

¹ Bishop Written Laws, § 18; 2 Kent Com. 305; East Hartford v. Hartford Bridge, 10 How. U. S. 511; State Bank v. Knoop, 16 How. U. S. 369; Bissell v. Jeffersonville, 24 How. U. S. 287.

² Louisiana v. St. Martin's, 111 U. S. 716; Von Hoffman v. Quincy, 4 Wal. 535.

³ Ante, § 208; Butler v. Pennsylvania, 10 How. U. S. 402.

⁴ Ante, § 559.

⁵ The State v. Barker, 4 Kan. 379, 435; United States v. Great Falls, &c. Co. 21 Md. 119.

⁶ Fletcher v. Peck, 6 Cranch, 87; Terrett v. Taylor, 9 Cranch, 43; Pawlet v. Clark, 9 Cranch, 292; Hart v.

Lamphire, 3 Pet. 280; McGee v. Mathis, 4 Wal. 143.

⁷ New Jersey v. Wilson, 7 Cranch, 164; McGee v. Mathis, supra; Thompson v. Holton, 6 McLean, 386.

⁸ Farrington v. Tennessee, 95 U. S. 679; State Bank v. Knoop, 16 How. U. S. 369; Ohio Life Ins. &c. Co. v. Debolt, 16 How. U. S. 416; Wright v. Sill, 2 Black, 544.

⁹ Christ Church v. Philadelphia, 24 How. U. S. 300; People v. Commissioners of Taxes, 47 N. Y. 501. And see Providence Bank v. Billings, 4 Pet. 514.

¹⁰ Beer Company v. Massachusetts, 97 U. S. 25, 33; Stone v. Mississippi, 101

for example, a statute is valid which forbids the carrying on of a lottery under a franchise previously bought of the State, by the parties, and paid for.¹ And a liquor license, granted and paid for, will not protect sales made in violation of subsequent legislation.²

III. *The Laws under which the Contract is made.*

§ 565. **Deemed Part of Contract.** — Irrespectively of the doctrine already explained, that, in general, the law enters into a contract and constitutes a part of it,³ the terms of our constitutional provision establish this rule absolutely, and exclude exceptions, as to the contracts to which it relates. The “obligation” of a contract is, by the simple meaning of the expression, the duty, in exact form and measure, which the law at the time and place of the making, assuming the place of its contemplated performance to be within the jurisdiction of the same law, imposes on the parties.⁴ “Illustrations of this proposition are found in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent, — in the liability of the drawer of a protested bill to pay exchange and damages, — and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement.”⁵

§ 566. **Under Conflicting Laws.** — This is not the place to inquire, in detail, how far the doctrine is to be modified when applied to a contract made in one State, to be performed in another. In reason, if, under the rules to be stated in a chapter further on, a contract is to be interpreted by laws other than those of the locality where made, they, instead of the local laws, should be read as parts of its stipulations, when we are considering the effect thereon of this constitu-

U. S. 814; *Butchers, &c. Co. v. Crescent City Live-stock, &c. Co.* 111 U. S. 746.

¹ *Bishop Stat. Crimes*, § 957; *Stone v. Mississippi*, *supra*.

² *Bishop Stat. Crimes*, § 992 *a*, 1001.

³ *Ante*, § 439-441.

⁴ *Von Hoffman v. Quincy*, 4 Wal. 535, 550; *Robards v. Brown*, 40 Ark. 423.

⁵ *Swayne, J., in Von Hoffman v. Quincy*, *supra*, at p. 550.

tional provision. But the courts have not looked at the matter quite so — or, at least, have added other questions to this one — when determining the effect of State insolvency laws.¹ It will compensate the astute practitioner to give to this sort of question, whenever it arises, a fresh and independent investigation.

IV. *Subsequent Laws impairing or not the Obligation.*

§ 567. **In General.** — Viewing a contract, therefore, as consisting both of the words of the parties and, mingled therewith, of all relevant provisions of the law under which it was made,² if now we find any obligation which the mingled contract imposes on either party attempted to be augmented, diminished, or otherwise changed by a later statute to the detriment of either, the enactment will be ineffectual for the purpose.³ Not only is the annihilation thereby of the entire stipulations, thus appearing, impossible;⁴ but, for example, no abatement of the interest which the law of a contract allowed,⁵ no other diminution of a sum payable, no injurious change in the manner or time of payment,⁶ no permission to the jury to estimate values which the parties had in their contract determined,⁷ no other tampering with the original “obligation,”⁸ is permissible. It follows that, —

¹ *Ogden v. Saunders*, 12 Wheat. 213; *Boyle v. Zacharie*, 6 Pet. 635, 643; *Suydam v. Broadnax*, 14 Pet. 67; *Hills v. Carlton*, 74 Maine, 156, and cases there cited; 3 Pars. Con. 553, 554.

² Ante, § 565, 566.

³ *Green v. Biddle*, 8 Wheat. 1; *Bronson v. Kinzie*, 1 How. U. S. 311, 316; *Lathrop v. Brown*, 1 Woods, 474; *Winter v. Jones*, 10 Ga. 190.

⁴ *Sturges v. Crowninshield*, 4 Wheat. 122; *McElvain v. Mudd*, 44 Ala. 48, 61; *Fitzpatrick v. Hearne*, 44 Ala. 171; *Curry v. Davis*, 44 Ala. 281; *McNealy v. Gregory*, 13 Fla. 417; *Calhoun v. Calhoun*, 2 S. C. 283.

⁵ Ante, § 565; *Cecil v. Deyerle*, 28 Grat. 775; *Kent v. Kent*, 28 Grat. 840;

Pretlow v. Bailey, 29 Grat. 212; *Roberts v. Cocke*, 28 Grat. 207; *Brewer v. Otoe*, 1 Neb. 373.

⁶ *Golden v. Prince*, 3 Wash. C. C. 313; *Randolph v. Middleton*, 11 C. E. Green, 543; *Farmers Bank v. Gunnell*, 26 Grat. 131. Compare with *Houston v. Jefferson College*, 13 Smith, Pa. 428.

⁷ *Wilmington, &c. Railroad v. King*, 91 U. S. 3.

⁸ *The State v. Richmond, &c. Railroad*, 73 N. C. 527; *Consolidated Assoc. v. Lord*, 35 La. An. 425; *Hovelman v. Kansas City Horse Railroad*, 79 Misso. 632; *Old Dominion Bank v. McVeigh*, 20 Grat. 457; *The State v. Gatzweiler*, 49 Misso. 17.

§ 568. **Subsequent to Contract.** — For a statute to be obnoxious to this provision, it must be made subsequently to the contract; since, as we have seen, the prior laws are interpreted into it, and thereby rendered parts thereof.¹ But, in reason, the prior laws covered by this proposition can be those only under which the contract came into existence; and neither prior nor subsequent ones of another State, where its enforcement may be sought, can be effectual, whatever their terms, to impair an obligation which the law of the contract, at the time of its making, imposed.²

§ 569. **Changes of Judicial Decision.** — The power both of making and of repealing laws is in our legislatures; and the courts have no jurisdiction, even to the minutest degree, in the matter. They can say what a law means; and, if afterward they see that they have made a mistake, they can correct their error by an overruling of the former decision. The consequence of which overruling is, that the blunder is thenceforward deemed never to have been law. This doctrine is fundamental in our jurisprudence, rendered irrepealable, it is believed, by various provisions of our written constitutions both National and State. Still, unhappily, in seeming violation of this doctrine, the courts have held that, where a statute has received what they term a settled exposition, then a contract has been made which under it is good, there is created an "obligation" which cannot be overturned by decisions overruling the earlier exposition.³

§ 570. **State Constitution.** — A provision added to the constitution of the State, or incorporated into a new one, is as ineffectual to impair the obligation of a prior contract as would be the same in a statute. It, also, is a "law."⁴

§ 571. **Remedy.** — The procedure for enforcing an obligation is no part of the obligation itself. And it has become established doctrine that the legislative power may, at pleas-

¹ *Railroad v. McClure*, 10 Wal. 511.

² *Ante*, § 554.

³ *Douglass v. Pike*, 101 U. S. 677; *Walker v. The State*, 12 S. C. 200; *Havemeyer v. Iowa*, 3 Wal. 294; *Thomson v. Lee*, 3 Wal. 327.

⁴ *Bishop Written Laws*, § 11 a; *Railroad v. McClure*, 10 Wal. 511; *Roach v. Gunter*, 44 Ala. 209; *Delmas v. Insurance Co.* 14 Wal. 661.

ure, change the remedy by any provisions which do not also impair the right.¹ In the Supreme Court of the United States the rule was stated to be, that, "in modes of proceeding and forms to enforce the contract, the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."² Thus,—

§ 572. *Illustrations.*—Legislation is valid which authorizes the parties in interest to sue in their own names on prior contracts,³ which makes criminal the breach of such contracts,⁴ which subjects existing debts to garnishment,⁵ which abolishes imprisonment for such debts,⁶ which compels creditors to sue their debtors within a limited time stated or be barred of the right,⁷ which determines the tribunal and how to proceed before it;⁸ but not, as said before, which takes away all remedy, or so shapes it as materially to diminish the right.⁹ Of the latter sort, for example, is a statute prohibiting any judicial sale of the debtor's property for less than a specified part of its appraised value,¹⁰ or withdrawing it from legal process,¹¹ or taking away a lien which a prior procedure had caused to attach.¹² But laws exempting from levy reasonable portions of the debtor's property, on which there is

¹ Bishop Written Laws, § 84, 85 *a*, 175–178.

² Woods, J., in Penniman's Case, 103 U. S. 714, 720. And see Curtis v. Whitney, 13 Wal. 68; Woodruff v. Scruggs, 27 Ark. 26; McCreary v. The State, 27 Ark. 425; Holland v. Dickerson, 41 Iowa, 367; Goodale v. Fennell, 27 Ohio State, 426.

³ Crawford v. Branch Bank, 7 How. U. S. 279.

⁴ Blann v. The State, 39 Ala. 353.

⁵ Philbrick v. Philbrick, 39 N. H. 468.

⁶ Penniman's Case, 103 U. S. 714; Lee v. Gamble, 3 Cranch C. C. 374; Sturges v. Crowninshield, 4 Wheat. 122.

⁷ Sturges v. Crowninshield, *supra*; Gilfillan v. Union Canal, 109 U. S. 401.

⁸ League v. De Young, 11 How. U. S. 185; Baltimore, &c. Railroad v. Nesbit, 10 How. U. S. 395.

⁹ Johnson v. Winslow, 64 N. C. 27; Coffman v. Bank of Kentucky, 40 Missis. 29; Hill v. Boyland, 40 Missis. 618; Wilcox v. Davis, 7 Minn. 23; Keough v. McNitt, 7 Minn. 30.

¹⁰ Bronson v. Kinzie, 1 How. U. S. 311; McCracken v. Hayward, 2 How. U. S. 608; Gantly v. Ewing, 3 How. U. S. 707; Howard v. Bugbee, 24 How. U. S. 461; Robards v. Brown, 40 Ark. 423; Lancaster Savings Inst. v. Reigart, 2 Pa. Law Jour. Rep. 238.

¹¹ The State v. Bank of the State, 1 S. C. 63.

¹² Gunn v. Barry, 15 Wal. 610.

no actual lien, are valid as to both prior and subsequent contracts.¹

§ 573. **Eminent Domain.** — The right, incident to every government, and with us exercised both by the States and by the United States, of taking with due compensation private property for public use,² is in no degree qualified by our constitutional provision; but it extends the same to real and personal property, corporation franchises, and other rights, which were vested through contract, as to things which came otherwise to their possessors.³ In this way, for example, the toll-bridge of a private corporation may be transferred to the public and made free.⁴ Again, —

§ 574. **Regulations of Property.** — To a degree which it is not within the scope of our present inquiries precisely to ascertain, the legislature may regulate the use of private property, the same as it may the conduct of its owners.⁵ There is no distinction, as to this, between property which has been vested through a contract and any other; it, and all other things are, for the public good, subject to the legislative control.⁶ Finally, —

§ 575. **Interfering with Franchise.** — After a corporation franchise, affecting public rights, has been granted, — as, for example, to maintain a toll-bridge, — the legislature may lawfully authorize another corporation to do the like, or otherwise set up a rival interest, especially if there has been no express undertaking to forbear.⁷

¹ Cooley Const. Lim. 287, 288, referring, among other places, to *Bronson v. Kinzie*, 1 How. U. S. 311. And see this place in Cooley for various other authorities and illustrations.

² *Kohl v. United States*, 91 U. S. 367; *Secombe v. Railroad*, 23 Wal. 108; *Jones v. Walker*, 2 Paine, 688; *Perry v. Wilson*, 7 Mass. 393, 395; *Cooper v. Williams*, 4 Ohio, 253; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 445.

³ *West River Bridge v. Dix*, 6 How. U. S. 507; *Philadelphia, &c. Railway's Appeal*, 6 Out. Pa. 123; *The State v. Noyes*, 47 Maine, 189; *Red River*

Bridge v. Clarksville, 1 Sneed, Tenn. 176; *Richmond, &c. Railroad v. Louisa Railroad*, 13 How. U. S. 71; *New York Central, &c. Railroad v. Metropolitan Gas-light Co.* 63 N. Y. 326, 334.

⁴ *In re Towanda Bridge*, 10 Norris, Pa. 216; *Central Bridge v. Lowell*, 4 Gray, 474, 481.

⁵ *Commonwealth v. Tewksbury*, 11 Met. 55. And see, for various illustrations, *Bishop Stat. Crimes*, § 793, 957, 995, 1130.

⁶ *Ante*, § 564; *Bishop Stat. Crimes*, § 957; *People v. Boston, &c. Railroad*, 70 N. Y. 569.

⁷ *Charles River Bridge v. Warren*

§ 576. *The Doctrine of this Chapter restated.*

The constitutional provision under consideration binds the States and not the United States, yet the Supreme Court of the United States is the final arbiter of all questions of its infraction. The States may, by their laws, render subsequent contracts subject to change or disruption by later legislation; yet, when this power has not been exercised, and there is nothing equivalent thereto in the stipulations of the parties, a contract relating to private interests can be dissolved or varied only by mutual consent. And still the remedies for enforcing it may be modified from time to time, by legislation, to any extent which does not impair the original "obligation," yet no further; and, *a fortiori*, they cannot be altogether taken away. At the same time, the contract is, to the like extent as other interests and things, liable to be appropriated by legislation, yet not without due compensation, to the public use; and it is likewise within the power which makes criminal whatever the legislative body deems to be detrimental to the public good.

Bridge, 7 Pick. 344; Butchers, &c. Co. v. Crescent City Live-stock, &c. Co. 111 U. S. 746; In re Hamilton Avenue, 14 Barb. 405; Lehigh Water Co.'s Appeal, 6 Out. Pa. 515; Fort Plain Bridge v. Smith, 30 N. Y. 44, 61; Turnpike v. The State, 3 Wal. 210; Shorter v. Smith, 9 Ga. 517; Collins v. Sherman, 31 Missis. 679.

CHAPTER XX.

THE IMPOSSIBLE IN LAW AND FACT.

§ 577, 578. Introduction.

579-583. Express Stipulation against the Impossible.

584-590. What deemed such or Equivalent.

591-608. Further of Stipulation and how in Absence thereof.

609. Doctrine of Chapter restated.

§ 577. **Cases and Dicta — How in this Chapter.** — The adjudications on our present subject are, at some points, in discord quite beyond the possibility of reconciliation. And often there is a want of harmony between the judicial words and actual decisions, of which the judges appear to be themselves unconscious. It would not comport with the plan of this work to discuss these differences at length; hence the only practical method will be to lay down and illustrate such leading doctrines as are best sustained by the combined force of authority and principle.

§ 578. **How Chapter divided.** — We shall consider, I. The Effect of an Express Stipulation against the Impossible; II. What will be construed as, or the Equivalent of, such a Stipulation; III. Further of the Stipulation and how in the Absence thereof.

I. *The Effect of an Express Stipulation against the Impossible.*

§ 579. *Impossibility of Fact: —*

Known — Unknown. — A mutual undertaking between parties to do what both know to be impossible is vain and idle, lacking the elements of contract, and no suit can be main-

tained thereon.¹ And, within this principle, “all conditions annexed to estates, that contain in them matter at the time of making of them impossible to be done, are void.”² But a contract may be good in favor of one who entered into it in ignorance³ of the impossibility of fact.⁴ For example, —

§ 580. **Marriage Promise between Married Parties.** — If a married man and a woman not knowing of his marriage agree to intermarry, she may avail herself of the contract, and bring suit for its breach immediately on learning of the deception.⁵ Yet, if both are married, or one only is so, and the other is aware of it, the mutual promise is, as to both, void.⁶ So, —

§ 581. **Sale with Warranty.** — If, while parties suppose a particular chattel to exist, one of them, believed to be the owner, sells it to the other with the covenant that he has power and authority to sell it, then, if in fact it has already been destroyed, the purchaser may maintain his suit on the contract.⁷ Yet, as already explained, if both the parties knew the formal bargain to be a mere act of mutual folly, it would be void.

§ 582. **Future Impossibility.** — An impossibility which may afterward arise or, as just seen, be disclosed, however its probability may be contemplated by the parties, is treated as unknown to both; for so it truly is. Therefore an agreement between them, whereby one is to pay the damages which the inevitable in the future may bring to the other, is valid. A familiar illustration is a policy of marine insurance, by which the underwriter promises to compensate the owner in money for damages from “perils of the sea,” against which

¹ 1 Britton, Nich. ed. 158, 239; *Nerot v. Wallace*, 3 T. R. 17, 22; Met. Con. 211; 1 Chit. Con. 11th Am. ed. 64; 2 Ib. 1073. See *Gilmer v. Gilmer*, 42 Ala. 9; *Faulkner v. Lowe*, 2 Exch. 595.

² Shep. Touch. 132. And see *Beswick v. Swindells*, 3 A. & E. 868, 5 Nev. & M. 378.

³ Ante, § 481.

⁴ Consult *Walker v. Tucker*, 70 Ill. 527; *Clifford v. Watts*, Law Rep. 5 C. P.

577; *Ashcroft v. Crow Orchard Colliery*, Law Rep. 9 Q. B. 540.

⁵ *Millward v. Littlewood*, 5 Exch. 775; *Kelley v. Riley*, 106 Mass. 339; *Coover v. Davenport*, 1 Heisk. Tenn. 368. And see *Pollock v. Sullivan*, 53 Vt. 507.

⁶ *Haviland v. Halstead*, 34 N. Y. 643; *Paddock v. Robinson*, 63 Ill. 99.

⁷ *Barr v. Gibson*, 3 M. & W. 390.

no human power is able to contend. This sort of contract is every day enforced in our courts.¹ The illustrations of it, besides the one just given, are abundant.²

§ 583. *Impossibility of Law* :—

In General — **Elsewhere.** — As both parties are conclusively presumed to know the law,³ stipulations to do what is simply against law are void, — a doctrine explained in a preceding chapter.⁴ Yet, as there shown also, and in accordance with what is said in the foregoing sections of this chapter, one who is innocently ignorant of the fact which renders performance unlawful may have his suit for damages against the other.⁵

II. *What will be construed as, or the Equivalent of, a Stipulation against the Impossible.*

§ 584. **Meaning of "Impossible."** — This is a word of inexact signification in legal writings. Sometimes it is employed in the sense of extremely difficult ; sometimes, as meaning what the party himself is unable to do. In connection with the subject of this chapter, it is occasionally used in such loose way ; but it is more appropriately limited to the impossibilities which proceed from what are technically called the acts of God, of the public enemy, and of the law, to be explained under our next sub-title. In a section just back,⁶ the non-existence of the thing contracted about is classed with the impossible ; but such a case may with equal or perhaps greater propriety be referred to other principles conducting to the same legal result. Commonly, in this chapter, the author uses the word in the limited sense just stated.

§ 585. **Differences — True Rule.** — The differences of judicial opinion, on the subject of this chapter,⁷ relate more to

¹ Taylor v. Dunbar, Law Rep. 4 C. P. 206 ; Baker v. Manufacturers Ins. Co. 12 Gray, 603 ; Flemming v. Marine Ins. Co. 4 Whart. 59.

² For example, Hoy v. Holt, 10 Norris, Pa. 88 ; Clark v. Glasgow Assur.

Co. 1 Macq. H. L. Cas. 668 ; Blodgett v. American Nat. Bank, 49 Conn. 9.

³ Ante, § 462.

⁴ Ante, § 467 et seq.

⁵ Ante, § 481-486, 579, 580.

⁶ Ante, § 581.

⁷ Ante, § 577.

the interpretation of the contract, as to whether or not it shall be deemed to contain the party's stipulation to be responsible for future impossibilities, than to any other question. The cases are believed not to be reconcilable; yet, from a part of them, and from the reason of the thing, we may assume it to be the true rule to construe the contract as embracing such stipulation only when its express words are so, or when by indirection they necessarily include it, or when the special subject is such as, for example, an insurance policy, makes this rendering inevitable. It would be vain for this condensed work to undertake an extensive exploration of the cases in elucidation of this rule; but something may be desirable, thus, —

§ 586. **Condition Precedent.** — Where a contract contains a condition precedent, — that is, where a stipulation is to bind a party only on the transpiring of a designated event, — such party cannot be in default so long as, from any cause, the condition remains unfulfilled.¹ Therefore, in such a case, it is immaterial that the performance of the condition was prevented by the act of God.² On this principle, after a sailor had taken, in lieu of other wages, the employer's promise to pay him a specified sum "provided he proceeds, continues, and does his duty as second mate in the said ship, from hence to the port of Liverpool," and he died before the ship arrived at the port, it was held that nothing could be recovered on the promise. Though his death was by the act of God, the condition still remained unfulfilled.³ And where a life-insurance policy was, by its terms, to be void if the insured should go south of a specified line without a written permit, and, under such permit, limited to a day mentioned, he went beyond the line, and by reason of sickness was unable to return, the condition of the policy was adjudged not to be avoided.⁴ Within a principle not differing greatly from this, —

¹ *Oakley v. Morton*, 1 Kernan, 25; 249; *Shrewsbury v. Hope-Scott*, 6 C. B. Bruce v. Snow, 20 N. H. 484; *Van- n. s. 1, 6 Jur. n. s. 452.*
² *horne v. Dorrance*, 2 Dal. 304, 317; *Bal-*
³ *timore, &c. Railroad v. Polly*, 14 Grat.
⁴ *Cutter v. Powell*, 6 T. R. 320.
 447; *Boyd v. Siffkin*, 2 Camp. 326.
⁴ *Evans v. United States Life Ins.*
Co. 64 N. Y. 304.

² *Mizell v. Burnett*, 4 Jones, N. C.

§ 587. **Non-existence of Thing.** — If the thing to which the contract relates is, contrary to the belief of the parties, not in existence, there being nothing to which it can attach, and their formal mutual consent being therefore the product of mutual mistake, there is no contract; a court of equity will set aside the seeming one, or it will be treated in a court of law as void.¹ And where a part only of a contract is so, such part will be construed as null, or as not meant to be embraced in the valid stipulations.² The doctrine also extends further; namely, —

§ 588. **Existence of Thing ceasing.** — If the contract assumes the continued existence of the thing, then, on performance becoming due, if, without the fault of the parties, the thing has ceased to exist, the case has become one of mutual mistake, and the duty to perform no longer remains.³ For example, where a public hall is let for a musical entertainment on a future day, if, before the day arrives, it is accidentally destroyed by fire, the bargain is ended.⁴ In these cases, where, before the thing has ceased to exist, there has been a part performance, complications may arise not so easily passed upon. Thus, where one undertook to build certain machinery into the structure of another, which was accidentally destroyed by fire while the work was in progress, it was first held that he might recover the value of what was actually put in;⁵ but the decision was reversed on appeal, both parties were excused from further performance, and the one who had done the work, not having reached the point at which he was entitled to be paid, was allowed nothing.⁶ A lessor of a hotel

¹ Ante, § 70, 71; *Allen v. Hammond*, 11 Pet. 63, 72; *Hitchcock v. Giddings*, 4 Price, 135; *Scruggs v. Driver*, 31 Ala. 274; *Harrell v. De Normandie*, 26 Texas, 120; *Daniel v. Mitchell*, 1 Story, 172; *Miles v. Stevens*, 3 Barr, 21; *Ketchum v. Catlin*, 21 Vt. 191; *French v. Townes*, 10 Grat. 513.

² *Clifford v. Watts*, Law Rep. 5 C. P. 577.

³ *Taylor v. Caldwell*, 3 B. & S. 826; *Walker v. Tucker*, 70 Ill. 527.

⁴ *Taylor v. Caldwell*, supra.

⁵ *Appleby v. Meyers*, Law Rep. 1 C. P. 615, 12 Jur. n. s. 500.

⁶ *Appleby v. Myers*, Law Rep. 2 C. P. 651. The Massachusetts decisions accord rather with the first than with the second adjudication of this case. *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 514, 517; *Cleary v. Sohier*, 120 Mass. 210. And see *Richardson v. Shaw*, 1 Misso. Ap. 234; post, § 597.

covenanted with the lessee that it should be supplied with water from a spring in the same manner as it then was, the spring became dry, yet the covenant was adjudged not to be violated.¹ One put his mare to a stallion, to pay on the service being done, but with the further agreement that if she did not prove with foal it might be repeated the next year without added compensation; it failed, the stallion died before the next season; and the court held that the fee must be paid by the owner of the mare, and that the benefit of the further service was his loss.² Parties agreed to make a certain allowance to a deserted wife "so long as she should continue separate and apart from her husband," and his death was held to terminate the agreement.³

§ 589. **Warranty.** — We have already seen that, if in these cases there is a warranty of the existence of the thing, the result is different.⁴ The ordinary construction is excluded by the express terms. Now, —

§ 590. **Express Terms as to Impossibility.** — There are multitudes of cases in which the judges have said that, to quote from an old one,⁵ "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."⁶ And this observation is not unfrequently applied even where the impediment came from the act of God.⁷ The doctrine, indeed, is often laid down in the most absolute and unqualified terms, excluding exceptions. But the actual adjudications, while discordant, come very much short of this; so that, as a whole, the *dictum* is not sustained by them. When one agrees in terms to do a thing, in reason he pledges

¹ Ward v. Vance, 12 Norris, Pa. 499, 502.

² Price v. Pepper, 13 Bush, 42.

³ Miller v. Woodward, 2 Beav. 271.

⁴ Ante, § 581.

⁵ Paradine v. Jane, Aleyn, 26.

⁶ For example, Atkinson v. Ritchie, 10 East, 530, 533; Harmony v. Bingham, 2 Kernan, 99, 107; West v. The Uncle Sam, McAl. 505; School Dis-

trict v. Dauchy, 25 Conn. 530; Bunn v. Prather, 21 Ill. 217; Davis v. Smith, 15 Misso. 467; Jemison v. McDaniel, 25 Missis. 83.

⁷ Mellish, L. J. in Wear Commissioners v. Adamson, 1 Q. B. D. 546, 548; Nichols v. Marsland, 2 Ex. D. 1, 4; Clifford v. Watts, Law Rep. 5 C. P. 577, 586; Mill Dam Foundry v. Hovey, 21 Pick. 417, 441.

himself to the capacity to do it, and assumes responsibility for obstacles and accidents. So likewise are the decisions.¹ But, if the absolute impossibility created by the act of God, or of a public enemy, or of a statute which the legislature may hereafter enact, were in the contemplation of the parties, the expression in their contract would not be, that the one should do it and the other pay for it; for such expression would, under the circumstances, be wholly inappropriate and ridiculous. A life-insurance company does not promise that the person insured shall live forever; its undertaking is, that, when the act of God terminates his life, it will pay to one designated a specified sum. When, therefore, in the ordinary case, parties agree that the one shall do a thing for the benefit of the other who shall pay so much money for the doing, and their agreement goes no further, their words exclude the supposition of either of them having contemplated the interposition of God, or of a public enemy, or of the law, to put performance above and beyond human power. On the coming of such impossibility, performance has ceased to be a thing of human contemplation; it is no longer the subject of any bargain, other than the one which the parties have, by the terms of their contract, carefully excluded therefrom, namely, for the one to make good the other's loss. The case is like that of the burned building;² the law may adjust the rights of the parties, but the contract has no relation to the facts, therefore it is to be treated as void for the want of matter on which to operate.³

III. *Further of the Stipulation and how in the Absence thereof.*

§ 591. **Difficult — Impossible to Party.** — One's undertaking, therefore, will bind him to whatever it is within the scope of private exertion to accomplish without violating the law, however inconvenient,⁴ however many obstacles he may en-

¹ Post, § 591.

² Ante, § 588.

³ And see observations in *Baily v. De*

Crespigny, Law Rep. 4 Q. B. 180, 185, 186.

⁴ *Duncan v. Gibson*, 45 Misso. 352;

counter, and however impossible its doing may be to him.¹ A familiar illustration is where a promisor is unable to fulfil his engagement through loss of his property, or otherwise through poverty; no one ever supposed this to be an excuse in law.² The other illustrations in the books are, in general, so mingled with judicial misapprehensions like those spoken of in the last section that only by resort to reason can we distinguish the sound from the unsound. But, for example, any unexpected hindrance to navigation³ will not in general excuse a person who has expressly contracted to carry goods or the like; for, however difficult to deal with the party may find the obstruction, there is ordinarily nothing in its nature absolutely insurmountable. But, —

§ 592. **Act of God — Public Enemy.** — Where, as already intimated, the thing contracted for becomes impossible through what is termed in the books “the act of God or the king’s enemies,”⁴ the one who has promised to do it (not promised to compensate the other for what he shall have suffered from its not being done⁵) is excused.⁶ There are cases which seem contrary to this, wherein defendants have been compelled to pay money because they could not contend successfully with the Almighty or with the public enemy.⁷

Lomis v. Ruetter, 9 Watts, 516; *Huling v. Craig*, Addison, 342; *Anspach v. Bast*, 2 Smith, Pa. 356; *Cobb v. Harmon*, 23 N. Y. 148; *Dodge v. Van Lear*, 5 Cranch, C. C. 278.

¹ Butler’s note to Co. Lit. 206 a; *Dermott v. Jones*, 2 Wal. 1; *Reid v. Edwards*, 7 Port. 508; *The Harriman*, 9 Wal. 161; *Stone v. Dennis*, 3 Port. 231; *Hale v. Rawson*, 4 Jur. n. s. 363, 364; *Walker v. Tucker*, 70 Ill. 527; *McDonald v. Gardner*, 56 Wis. 35.

² And see *McCreery v. Green*, 38 Mich. 172.

³ *Harmony v. Bingham*, 2 Kernan, 99; *Shubrick v. Salmond*, 3 Bur. 1637; *Parker v. Winlow*, 7 Ellis & B. 942; *Eugster v. West*, 35 La. An. 119.

⁴ *Jones Bailm. Am. ed. of 1807*, p. 120.

⁵ Ante, § 582, 590.

⁶ *Morrow v. Campbell*, 7 Port. 41; *The Eliza, Daveis*, D. C. 316; *Miller v. Phillips*, 7 Casey, Pa. 218; *Brown v. Dillahunty*, 4 Sm. & M. 713; *Gillespie v. Hamilton*, 3 Madd. 251, 254; *Selden v. Preston*, 11 Bush, 191; *Usher v. Hiatt*, 18 Kan. 195; *Baily v. De Crespigny*, Law Rep. 4 Q. B. 180, 185; *Howell v. Coupland*, Law Rep. 9 Q. B. 462, 1 Q. B. D. 258; see *Ide v. Fassett*, 45 Vt. 68.

⁷ See, and compare, *Gillespie v. Hamilton*, 3 Madd. 251, 254; *Howell v. Coupland*, 1 Q. B. D. 258; *Booth v. Spuyten Duyvil Rolling Mill Co.* 3 Thomp. & C. 368; *Bryan v. Spurgin*, 5 Sneed, Tenn. 681; *West v. The Uncle Sam*, McAl. 505; *Jemison v. McDaniel*, 25 Missis. 83; *Hore v. Whitmore*, Cowp. 784; *Cassady v. Clarke*, 2 Eng. 123; *Clancy v. Overman*, 1 Dev. & Bat. 402; *School District v. Dauchy*, 25 Conn. 530.

§ 593. **Same defined.**—The “act of God,” within this doctrine, is some manifestation of nature to which man has not contributed and which he cannot overcome, such as lightning and the fire it kindles, cold, or a tempest, but not a fire from an ordinary accident.¹ By the “act of the public enemy,” are meant the ravages or restraints of war, but not of a robber or a mob.²

§ 594. **Act of the Law.**—We have seen that the constitutional provision against impairing the obligation of contracts does not restrain legislation from making unlawful the thing lawfully agreed to be done.³ When, therefore, the carrying out of a contract is thus forbidden by law, the decisions are uniform that the party who was under obligation to do the thing is excused.⁴ Within this principle, a declaration of war may dissolve a contract of affreightment.⁵ And when, during slavery, one sold a life estate in slaves, covenanting to protect through such life the purchaser in his title to them, their emancipation by law was held not to put him in default.⁶

§ 595. **Created by Law — Legal Duty impossible.**—Upon

¹ *Nichols v. Marsland*, Law Rep. 10 Ex. 255; *Chicago, &c. Railroad v. Sawyer*, 69 Ill. 285; *Price v. Hartshorn*, 44 N. Y. 94; *Forward v. Pittard*, 1 T. R. 27; *Brousseau v. Hudson*, 11 La. An. 427; *Alsept v. Eyles*, 2 H. Bl. 108, 113; *Trent Navigation v. Wood*, 3 Esp. 127; *Rex v. Somerset*, 8 T. R. 312; *Amies v. Stevens*, 1 Stra. 128; *Bird v. Astcock*, 2 Bulst. 280; *Mouse's Case*, 12 Co. 63; *Merchants Despatch Co. v. Smith*, 76 Ill. 542; *Vail v. Pacific Railroad*, 63 Misso. 230. “The books generally mention a promise to go from London to Rome in three hours, as a promise that would be void because impossible to be performed.” Met. Con. 214. The impediment in this case, the reader perceives, is an “act of God,” within our definition; it is inherent in the nature which God has given to man, rendering such rapidity of locomotion impossible to any one; or, in the language of our definition, it is a “manifestation of nature to which man has

not contributed, and which he cannot overcome.”

² *Forward v. Pittard*, supra, at p. 34; *Elliott v. Norfolk*, 4 T. R. 789; *Trent Navigation v. Wood*, supra; *Gordon v. Rimmington*, 1 Camp. 123; *The State v. Moore*, 74 Misso. 413; *Sugarman v. The State*, 28 Ark. 142. See *Lake Shore, &c. Railway v. Bennett*, 89 Ind. 457.

³ Ante, § 564, 574.

⁴ *Brewster v. Kitchell*, 1 Salk. 198; *Brown v. Dillahunty*, 4 Sm. & M. 713; *Brick Presbyterian Church v. New York*, 5 Cow. 538; *Anglesea v. Rugeley*, 6 Q. B. 107, 114; *Baily v. De Crespigny*, Law Rep. 4 Q. B. 180, 186, 187; *Baker v. Johnson*, 42 N. Y. 126; *Mississippi, &c. Railroad v. Green*, 9 Heisk. 588.

⁵ *Esposito v. Bowden*, 7 Ellis & B. 763, 3 Jur. N. S. 1209.

⁶ *Trimmier v. Thomson*, 10 S. C. 164, 184; *Calhoun v. Calhoun*, 2 S. C. 283, 304.

another question, also, the authorities agree; namely, that when the law creates a contract, or otherwise casts on one a duty, he is excused if the thing becomes, in the absolute sense we are considering, impossible. A person thus obligated is not required, however the rule may be where the contract is in words, to contend with the Almighty, or in his private capacity to overcome the public enemy.¹ A familiar illustration is, —

§ 596. **Common Carrier.** — The law casts upon the common carrier the duty as of contract² to carry the goods safely. If they are destroyed by fire, which is not deemed the act of God,³ he is responsible.⁴ But if their destruction is caused by the act of God or of a public enemy, and he is himself using due diligence to preserve them and carry them in safety,⁵ he is excused,⁶ while no obstacles short of these will suffice.⁷ These consequences are not unfrequently varied by express contract.

§ 597. *Other Illustrations and Explanations: —*

Some further elucidations of the doctrines of this sub-title will be helpful; thus, —

Destruction by Fire. — We have seen what is the effect of the thing contracted about having ceased to exist because of an accidental fire.⁸ The erroneous idea, that the promise to

¹ Mosely v. Baker, 2 Sneed, Tenn. 362; Rex v. Somerset, 8 T. R. 312; Nichols v. Marsland, Law Rep. 10 Ex. 255; Cassady v. Clarke, 2 Eng. 123; Rylands v. Fletcher, Law Rep. 3 H. L. 330, 340, 342; Clark v. Glasgow Assur. Co. 1 Macq. H. L. Cas. 668; The State v. Clarke, 73 N. C. 255; Havens v. Lathene, 75 N. C. 505; Norcross v. Norcross, 53 Maine, 163.

² Ante, § 204.

³ Ante, § 593. "In the case of sea-going vessels, Congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire, unless caused by their own design or neglect," &c. Bradley, J. in Railroad v. Lockwood, 17 Wal. 357, 360.

⁴ Forward v. Pittard, 1 T. R. 27; Merchants Despatch Transp. Co. v.

Kahn, 76 Ill. 520; Pittsburgh, &c. Railway v. Barrett, 36 Ohio State, 448.

⁵ Holladay v. Kennard, 12 Wal. 254; Lamont v. Nashville, &c. Railroad, 9 Heisk. 58; Miltimore v. Chicago, &c. Railway, 37 Wis. 190; The Rocket, 1 Bis. 354; Packard v. Taylor, 35 Ark. 402; Caldwell v. Southern Exp. Co. 1 Flip. 85.

⁶ Southern Express v. Womack, 1 Heisk. 256; Strohn v. Detroit, &c. Railroad, 23 Wis. 126; Lewis v. Ludwick, 6 Coldw. 368; Wallace v. Sanders, 42 Ga. 486; Houston, &c. Railway v. Harn, 44 Texas, 628.

⁷ Illinois Central Railroad v. McClellan, 54 Ill. 58, 70; Seligman v. Armijo, 1 New Mex. 459.

⁸ Ante, § 588.

do a thing binds the promisor to pay whatever loss the act of God brings by putting a stop to the doing, has been assigned as the reason for the just conclusion, that one's undertaking to build a house on another's land is not discharged by his partly building it, followed by an accidental fire consuming the incomplete structure.¹ Such fire not being the act of God, the case is not within any rule on the subject. Besides, another house will just as well answer the contract. It is the same, also, where a printer bargains to supply a given number of copies of a book; if a part are delivered, then his premises, with the rest, are burned, his contract remains unfulfilled.² Again, —

§ 598. **Lease of Realty.** — The lessee of a house and land, if he is driven off by the public enemy, or if the house is destroyed by the act of God, is not freed from his covenant to pay rent;³ *a fortiori*, he is not, if an accidental fire consumes the house.⁴ For this sound rule of law, there are two excellent reasons: first, the lease creates a vested estate in the realty, and the covenant to pay rent simply specifies by what instalments the consideration is to be given;⁵ secondly, the act of God interfered in no manner with paying the money, it did a thing entirely different. Yet, —

§ 599. **Failure of Consideration.** — If the consideration for a promise fails through the act of God, it is discharged; as, where one agreed to pay a sum for tuition during a specified quarter, but was sick, the court refused to compel him. The sickness, which in law is the act of God, did not disable him to pay, but it rendered impossible his receiving the instruction, which was the foundation for the promise.⁶

§ 600. **Personal Services.** — One who stipulates to serve another in person, or to do for him anything else which cannot

¹ Adams v. Nichols, 19 Pick. 275. See Boyle v. Agawam Canal, 22 Pick. 381; Dermott v. Jones, 2 Wal. 1; Rawson v. Clark, 70 Ill. 656.

² Adlard v. Booth, 7 Car. & P. 108.

³ 3 Kent Com. 465-467; 2 Chit. Con. 11th Am. ed. 1074; Paradine v. Jane, Ayleyn, 26.

⁴ Baker v. Holtpzaffell, 4 Taunt. 45; Packer v. Gibbins, 1 Q. B. 421, 5 Jur. 1036; Izon v. Gorton, 5 Bing. N. C. 501, 3 Jur. 653.

⁵ See, as illustrative, Calloway v. Hamby, 65 N. C. 631; Wilkinson v. Cook, 44 Missis. 367; Dowdy v. McLellan, 52 Ga. 408.

⁶ Stewart v. Loring, 5 Allen, 306. See

be done by proxy, or for another's doing a thing of this nature,¹ is released if the act of God in the form of sickness or of death prevents the doing; no action can be maintained against him or his administrator as for a breach of contract.² It is otherwise where the failure is from a less serious cause.³ For an example of the former sort, —

§ 601. **Apprenticeship.** — A contract of apprenticeship, which is specially personal both to the apprentice and to the master, is terminated by the death of either.⁴ Again, —

§ 602. **Appearance Bond.** — One bound for another's appearance in court is excused if, before the day, the latter dies.⁵ On the other hand, —

§ 603. **Performance by Proxy.** — When the thing is of a sort not requiring the services or superintendence of the promisor in person, — for example, when it is the carpenter work of a house, — his sickness creates no impossibility, for he can perform by proxy.⁶ Or, if in such a case he dies, his personal representatives are entitled to perform, and collect the agreed compensation; ⁷ and they must do it, or respond in damages.⁸ On the other hand, the party surviving is thus in default if he obstructs fulfilment by the other's administrator.⁹ Hence, —

§ 604. **Sickness deterring.** — Whether sickness is to constitute an excuse or not, as being the act of God, will depend on the circumstances of the case, and perhaps in some degree on the special views of the particular tribunal. According to one case, if, at the place where labor contracted for is to be

Anglo-Egyptian Nav. Co. v. Rennie, Law Rep. 10 C. P. 271.

¹ *Spalding v. Rosa*, 71 N. Y. 40, 44.

² *Knight v. Bean*, 22 Maine, 531; *Robinson v. Davison*, Law Rep. 6 Ex. 269; *Stubbs v. Holywell Railway*, Law Rep. 2 Ex. 311; *Poussard v. Spiers*, 1 Q. B. D. 410, 414; *Harrington v. Fall River Iron Works*, 119 Mass. 82; *Siler v. Gray*, 86 N. C. 566.

³ *Earp v. Tyler*, 73 Misso. 617.

⁴ *Boast v. Firth*, Law Rep. 4 C. P. 1; *Whincup v. Hughes*, Law Rep. 6 C. P. 78; *Farrow v. Wilson*, Law Rep. 4 C. P. 744. See *Martin v. Hunt*, 1 Allen,

418; *Hayes v. Willio*, 4 Daly, 259; *Davenport v. Gentry*, 9 B. Monr. 427.

⁵ *Scully v. Kirkpatrick*, 29 Smith, Pa. 324. For a fuller explanation, see 1 Bishop Crim. Proced. § 264 i.

⁶ *Cassady v. Clarke*, 2 Eng. 123.

⁷ *Werner v. Humphreys*, 3 Scott, N. R. 226, 2 Man. & G. 853.

⁸ *Hawkins v. Ball*, 18 B. Monr. 816; *Smith v. Wilmington Coal, &c. Co.* 83 Ill. 498; *Siler v. Gray*, 86 N. C. 566. And see *Lloyd's v. Harper*, 16 Ch. D. 290.

⁹ *White v. Allen*, 133 Mass. 423.

done, a fatal and contagious disease prevails during all the time, rendering it imprudent to work and therefore impossible to procure suitable workmen, performance will be excused. Or if, before the contagion came, the work was in part executed, the party may recover pay for it on a *quantum meruit*.¹ In another case, a public school was suspended on account of small-pox, but the teacher recovered the wages provided for in his contract.²

§ 605. **Substantial Performance.**—When there can be a substantial performance of what in the exact terms of the contract is impossible, it will be required.³ So if a statute makes a contract in part unlawful, the remainder should be carried out,⁴—but not, in reason, if the parts are so connected that injustice will thus be done. And—

§ 606. **Alternative Provisions.**—Where the undertaking is to do one of two things, the impossibility of doing the one does not excuse the doing of the other.⁵

§ 607. **Judicial Process,**—interrupting the doing of the thing, and rendering it impossible, will excuse performance.⁶

§ 608. **Conditions**—in contracts are either precedent or subsequent. But whether a particular condition is the one or the other, if, when the contract is made, it is impossible but not unlawful, it, only, is void; and the rest of the contract takes effect or is enforceable as though it contained no condition.⁷ Yet if a condition precedent is not known to be impossible at the making of the contract, and it becomes so by the act of God, still the other party cannot be placed in

¹ *Lakeman v. Pollard*, 43 Maine, 463. And see *Sickels v. United States*, 1 Ct. of Cl. 214.

² *Dewey v. Alpena School Dist.* 43 Mich. 480.

³ *White v. Mann*, 26 Maine, 361; *Williams v. Vanderbilt*, 28 N. Y. 217; *Chase v. Barrett*, 4 Paige, 148.

⁴ *Bettesworth v. St. Paul's*, 1 Bro. P. C. 240.

⁵ *Da Costa v. Davis*, 1 B. & P. 242; *Stevens v. Webb*, 7 Car. & P. 60, 62; *Barkworth v. Young*, 4 Drew. 1, 3 Jur. n. s. 34; *Drake v. White*, 117 Mass. 10,

13. See *Erie Railway v. Union Locomotive, &c. Co.* 6 Vroom, 240; *Layton v. Pearce*, 1 Doug. 15; *Brown v. Royal Ins. Co.* 1 Ellis & E. 853, 5 Jur. n. s. 1255; *Edwards v. West*, 7 Ch. D. 858.

⁶ *Walker v. Pitts*, 24 Pick. 191, 195; *Lord v. Thomas*, 64 N. Y. 107; *Bain v. Lyle*, 18 Smith, Pa. 60; *Ohio, &c. Railway v. Yohe*, 51 Ind. 181; *Leopold v. Salkey*, 89 Ill. 412; *People v. Globe Mut. Life Ins. Co.* 91 N. Y. 174.

⁷ *Co. Lit.* 206; *Hughes v. Edwards*, 9 Wheat. 489; *Merrill v. Bell*, 6 Sm. & M. 730. See *Barksdale v. Elam*, 30

default while even for this cause it remains unperformed.¹ There are some nice and curious questions connected with conditions rendered impossible by matter subsequent, but it is best not to enter into them further here.²

§ 609. *The Doctrine of this Chapter restated.*

A principle in our law forbids that men shall suffer from the inevitable.³ For example, one who lawfully and without carelessness keeps an animal not known to be vicious, is not responsible if it injures the person or property of another.⁴ On this principle, a man who has promised to do a thing, but is prevented by overwhelming necessity, or by an interdict from the law, will not be compelled to suffer as for a breach of contract. Yet if his undertaking was to pay the damages, it may be enforced; for, where a loss may fall on one from a contingent event, another can lawfully, on receiving a consideration, assume it. This is a sort of insurance, not violative of any rule of policy or of law.

But there are, both in natural reason and in the law, various degrees of necessity. And, within the present topic, the standard of necessity is what comes from the act of God, the act of a public enemy, or the forbidding of the thing by law.

Missis. 694. According to *Beswick v. Swindells*, 5 Nev. & M. 378, 3 A. & E. 868, where the condition of a bond is originally impossible, the bond is absolute; where originally illegal, it is void. Where the condition becomes afterward impossible by the act of the obligor or a stranger, the bond is forfeited; where, by the act of the obligee, it is saved.

¹ *Mizell v. Burnett*, 4 Jones, N. C. 249; *Poussard v. Spiers*, 1 Q. B. D. 410; *Bettini v. Gye*, 1 Q. B. D. 183; *Howell v. Knickerbocker Life Ins. Co.* 44 N. Y. 276.

² Co. Lit. 205, 206; *Irion v. Hume*, 50 Missis. 419, 426; *Bain v. Lyle*, 18 Smith, Pa. 60; *Merrill v. Emery*, 10 Pick. 507; *People v. Manning*, 8 Cow. 297; *Holland v. Bouldin*, 4 T. B. Monr. 147.

³ *Australasian Steam Nav. Co. v. Morse*, Law Rep. 4 P. C. 222, 228; 1 Bishop Crim. Law, § 346, 351; *Terry v. New York*, 8 Bosw. 504; *Newton v. Pope*, 1 Cow. 109.

⁴ *Dearth v. Baker*, 22 Wis. 73; *Decker v. Gammon*, 44 Maine, 322; *Meredith v. Reed*, 26 Ind. 334.

CHAPTER XXI.

THE VOID AND VOIDABLE IN CONTRACTS.¹

§ 610-612. Introduction.

613-616. Void.

617-621. Voidable.

622. Doctrine of Chapter restated.

§ 610. **Inexact Meanings.**—The words “void” and “voidable” are, as practically employed in our law writings, among the most inexact and variable.² And while they number but two, there are more than two ideas, or shades of idea, which they are necessarily pressed into the service of conveying; some being plain and simple, others refined and complex. Still, less minutely viewed, they are distinct in meaning, and not difficult to be —

§ 611. **Defined.**—A contract is void when it is without any legal effect;³ voidable, when it has some effect, but is liable to be made void by one of the parties or a third person.⁴

§ 612. **How Chapter divided.**—We shall consider, I. Void; II. Voidable.

I. *Void.*

§ 613. **One Meaning.**—In exact legal language, “void” has but the one meaning just given.⁵ To illustrate, —

¹ Compare with the chapter on “Void and Voidable,” 1 Bishop Mar. & Div. § 104 *a* et seq.

² 1 *Ib.* 104 *a*; *Crocker v. Bellangee*, 6 Wis. 645; *Bromley v. Goodrich*, 40 Wis. 131; *Kearney v. Vaughan*, 50 Misso. 284, 287.

³ *Ante*, § 188; *Abbot v. Parsons*, 3 Bur. 1794, 1805; *Baker v. Painter*, Law

Rep. 2 C. P. 492, 496; *Manning v. Gill*, Law Rep. 13 Eq. 485, 489.

⁴ *Pearsoll v. Chapin*, 8 Wright, Pa. 9.

⁵ What void. — As to what particular contracts are void, Lowrie, C. J., in *Pearsoll v. Chapin*, *supra*, at p. 14, 15, said: “Contracts and acts that are absolutely void are contracts to do an illegal act, or omit a legal public duty;

§ 614. **Consequences.** — A void deed of land conveys nothing.¹ A void sale of goods passes no title, though they are delivered;² not even operating as a gift.³ And persons other than the direct parties, equally with them, may impeach a void judgment.⁴ There can be no confirmation of a void contract;⁵ nor will it constitute an adequate consideration for a new one.⁶ Still, —

§ 615. **Recover back.** — The performance of a void contract may produce consequences not void; as, if one voluntarily and with full knowledge of the facts pays money on it, he cannot recover the money back.⁷

§ 616. **"Void" for "Voidable."** — In spite of what we have thus seen to be the true meaning of the word void, it is often used, both in law writings⁸ and in statutes,⁹ in the sense of voidable.¹⁰ Nor is such use quite without reason; for a voidable thing is void whenever the party entitled chooses to avoid it.¹¹ And it is precisely accurate to say that a thing is *void at the election* of the party, meaning *voidable*; for example, a

usually bonds of married women; contracts in a form forbidden by law; official acts of persons having no recognized *de facto* or *de jure* title to the office; contracts to do an impossible thing, or that leave uncertain the thing to be done, and such like. These are absolutely void, because they have no legal sanction, and establish no legitimate bond or relation between the parties, and even a stranger may raise the objection. 2 Leon. 218; Moore, 105. The law cannot enforce that, the doing of which would be a wrong to itself or to public order." Other illustrations of the void contract appear in various connections throughout this work.

¹ Manning v. Gill, Law Rep. 13 Eq. 485.

² Com. Dig. "Enfant," C. 2.

³ Ante, § 82.

⁴ Martin v. Judd, 60 Ill. 78; Kearney v. Vaughan, 50 Misso. 284, 287.

⁵ Ante, § 542; Perkins, § 154, as cited by Lord Mansfield in Abbot v. Parsons, 3 Bur. 1794, 1805; Lowrie, C. J., in Pearsoll v. Chapin, 8 Wright,

Pa. 9, 15; McIntosh v. Lee, 57 Iowa, 356.

⁶ Murphy v. Jones, 7 Ind. 529; Ehle v. Judson, 24 Wend. 97; Jarvis v. Sutton, 3 Ind. 289.

⁷ Ante, § 81, 82; Woodburn v. Stout, 28 Ind. 77. And see Babcock v. Fond du Lac, 58 Wis. 230. But see Gist v. Smith, 78 Ky. 367.

⁸ Pearsoll v. Chapin, 8 Wright, Pa. 9, 13; Matthews v. Baxter, Law Rep. 8 Ex. 132, 133.

⁹ St. Nicholas's Case, 2 Stra. 1066, Cas. temp. Hardw. 323; Rex v. Evered, Cald. 26; Ewell v. Daggs, 108 U. S. 143; Young v. Billiter, 8 H. L. Cas. 682, 7 Jur. n. s. 269; Anderson v. Roberts, 18 Johns. 515; Van Shaack v. Robbins, 36 Iowa, 201. But it is not always so in a statute. Pearse v. Morrice, 2 A. & E. 84.

¹⁰ Kearney v. Vaughan, 50 Misso. 284, 287; Seylar v. Carson, 19 Smith, Pa. 81; Allis v. Billings, 6 Met. 415, 417.

¹¹ Crocker v. Bellangee, 6 Wis. 645; Bromley v. Goodrich, 40 Wis. 131.

contract between an infant and an adult to marry is made void by the refusal of the infant.¹ “Provisions in leases,” said Lowrie, C. J., “are very common, that, if the tenant shall not, with due promptness, perform his covenants to build, repair, insure, pay rent, and such like, the lease shall be *void*, or utterly null and void, to all intents and purposes, or expressions of similar import; yet these terms are very often, perhaps generally, held to mean *voidable*, and not void.”²

II. *Voidable.*

§ 617. **Variable** — as we have seen the word “void” to be in practical use, “voidable” is still more so. The expression in our definition,³ that the voidable contract “has some effect,” is as precise as the truth of the law permits, for the effects differ; so the rest of the definition, that it “is liable to be made void by one of the parties or a third person,” truly represents the variable law, which requires the avoiding to be done by different persons or methods according to the nature of the case. The foundation of the difficulty seems to be in the paucity of the language, which has but the one word to express a considerable number of ideas.⁴ To illustrate, —

§ 618. **In Fraud, Infancy, Insanity.** — Not to attempt absolute accuracy here, in what will be more satisfactorily stated in chapters further on, largely, but not in all circumstances, a contract vitiated by fraud, infancy, or insanity is not void but voidable. The effect whereof is, that, for example, a sale by the incapable or defrauded person, made in due form, transmits the seisin or ownership of the lands or goods, and the avoiding thereof reinvests them in the seller; but if, while the sale remained voidable, they were transmitted for a

¹ *Holt v. Clarencieux*, 2 Stra. 937, v. Palmer, 19 C. B. N. S. 393, 11 Jur. 939; the expression in this case being, N. S. 876.
however, “*voidable* at his election.”

³ Ante, § 611.

² *Pearsoll v. Chapin*, ut sup. at p. 13.
And see *Rede v. Farr*, 6 M. & S. 121;
Nash v. Birch, 1 M. & W. 402; *Hughes*

⁴ And see 1 Bishop Mar. & Div. § 104 a, and the observations of Lowrie, C. J., in *Pearsoll v. Chapin*, 8 Wright, Pa. 9.

valuable consideration to a third person, the consequences vary with the cases.

§ 619. **In Marriage.** — In matrimonial law, the term “voidable” is employed in a considerable variety of meanings, some of which are unknown in the ordinary law of contracts.¹ Commonly and strictly, by the unwritten marriage law, a voidable marriage, while it remains so, has the same effect as a perfect one; and it can be avoided only, during the lives of both parties, by a judicial sentence, pronounced in a suit instituted for the very purpose.²

§ 620. **Ratify — Avoid.** — Unlike void contracts,³ the voidable may, in general, and perhaps always if the right means are employed, be perfected by ratification.⁴ They can be avoided only by parties entitled,⁵ and in ways which the law permits. For most, a mere declaration or act *in pais*, from the proper person, suffices; but some require judicial process. As to which, and further questions, —

§ 621. **In Conclusion.** — The reader’s attention having thus been directed to the distinctions under consideration, he can now, aided by these general views, best master the details in connection with particular topics as they arise.

§ 622. *The Doctrine of this Chapter restated.*

There is only one sort of “void” contract, in the strict meaning of the word. But, less accurately, the books often speak of voidable contracts as void. Any contract which has some legal effect, yet which one of the parties or a third person can make void, is termed “voidable.” But the qualities of this contract, and the methods of avoiding it, differ. There are, therefore, many varieties of the voidable; yet they can be particularized only by circumlocution, our language not having separate words to designate them.

¹ 1 Bishop Mar. & Div. § 105–120.

² *Ib.* § 105.

³ *Ante*, § 614.

⁴ *Matthews v. Baxter*, Law Rep. 8

Ex. 132; *Benedict v. National Bank*, 4 Daly, 171.

⁵ *Martin v. Judd*, 60 Ill. 78; *Hughes v. Palmer*, 19 C. B. n. s. 393, 11 Jur. n. s. 876.

CHAPTER XXII.

CONTRACTS DISTINGUISHED AS EXECUTORY AND EXECUTED.

§ 623. **Elsewhere.** — In the chapter on the Consideration, there is much which might well be deemed a part of the present one.¹ So, in various other connections, this distinction is more or less explained as to the particular topics.

§ 624. **"Executory," "Executed," defined.** — A contract is executory when the thing agreed has not been done.² It is executed when the thing has been done.³ After one party has performed while the other has not, it is said to be executed on the one side and executory on the other.⁴ One who has begun to do what he promised, but has not finished, has executed his undertaking in part.

§ 625. **Effect of Executed.** — Subject to exceptions growing out of special reasons, the execution of a contract cures all defects therein. Thus, —

§ 626. **Consideration.** — We have already seen, that the want of a consideration is of no avail against an executed contract.⁵ Again, —

§ 627. **Illegal Contract Executed.** — An agreement to do a thing contrary to law or public policy can be enforced by neither party against the other.⁶ But the parties' voluntary doing of what they had unlawfully agreed places them, in effect, in the same position as if the contract had been originally good ; neither can recover of the other what was parted

¹ Ante, § 76-93.

² *Fletcher v. Peck*, 6 Cranch, 87, 136.

³ *Frazer v. Robinson*, 42 Missis. 121 ;
Robison v. Robison, 44 Ala. 227.

⁴ And see ante, § 85-87.

⁵ Ante, § 80-84.

⁶ Ante, § 467 et seq.

with. The reason for which is,¹ that, since they are equally in fault, the law will help neither.² Hence, —

§ 628. **Unlawful in One.** — If, as in some special cases it happens, the contract was unlawful in one of the parties only,³ the other may recover back what he has paid under it.⁴ And this principle is sometimes carried to the extent that, —

§ 629. **One less in Fault.** — If both are in fault, yet not equally so, and especially if the one more in the wrong has taken any undue advantage of the other, the more culpable party may be compelled to refund what the less culpable has paid.⁵

§ 630. **Voluntary, not Illegal.** — Where neither party has violated law or public policy, and there is no fraud, duress, or anything of the sort, a voluntary payment which one with full knowledge of the facts has made to the other cannot be recovered back, though he was not compellable to make it, and he did it under protest. The executed transaction stands.⁶

§ 631. **Mistake of Law.** — As all persons are conclusively presumed to know what the law is,⁷ one who makes a payment supposing himself compellable while he is not — that is, pays under a mistake of law — cannot recover the

¹ Ante, § 489.

² Ante, § 509, and note, 545; *Greenwood v. Curtis*, 6 Mass. 358; *Levet v. Creditors*, 22 La. An. 105; *Morris v. Hall*, 41 Ala. 510; *Green v. Hollingsworth*, 5 Dana, 173; *Ingersoll v. Campbell*, 46 Ala. 282; *Marksbury v. Taylor*, 10 Bush, 519; *Myers v. Meinrath*, 101 Mass. 366; *Barnard v. Crane*, 1 Tyler, 457; *Burt v. Place*, 6 Cow. 431; *Babcock v. Thompson*, 3 Pick. 446; *Worcester v. Eaton*, 11 Mass. 368; *Merwin v. Huntington*, 2 Conn. 209; *Groton v. Waldoborough*, 2 Fairf. 306; *Jacobs v. Stokes*, 12 Mich. 381; *Spalding v. Muskingum*, 12 Ohio, 544; *Tyler v. Smith*, 18 B. Monr. 793; *Liness v. Hesing*, 44 Ill. 113; *Arter v. Byington*, 44 Ill. 468; *Boutelle v. Melendy*, 19 N. H. 196; *Kerr v. Birnie*, 25 Ark. 225; *Hall*

v. Costello, 48 N. H. 176; *Delhomme v. Duson*, 28 La. An. 646.

³ Ante, § 481, 482, 489.

⁴ *Jaques v. Golightly*, 2 W. Bl. 1073, 1075, and other English and American cases cited by *Selden, J.*, in *Tracy v. Talmage*, 4 Kernan, 162, 183 et seq. And see *Curtis v. Leavitt*, 15 N. Y. 9.

⁵ *Smith v. Bromley*, 2 Doug. 695, note; *Worcester v. Eaton*, 11 Mass. 368, 376; *Tracy v. Talmage*, 4 Kernan, 162, 181. And see ante, § 489.

⁶ *Awalt v. Eutaw Building Association*, 34 Md. 435; *Williams v. Colby*, 44 Vt. 40; *Commercial Bank v. Reed*, 11 Ohio, 498; *Patterson v. Cox*, 25 Ind. 261; *Benson v. Monroe*, 7 Cush. 125; *Cook v. Boston*, 9 Allen, 393.

⁷ Ante, § 462.

money back. In legal contemplation, his act was voluntary.¹ But, —

§ 632. **Fact mistaken — Fraud — Duress of Goods.** — If he paid under a mistake of fact,² or through fraud or other constraint from the other party,³ or to prevent being dispossessed of his property, though he knew the demand to be illegal,⁴ he may have his money again.

§ 633. **Why Recovery back — (Promise created).** — Where, as in some of the foregoing cases, the law compels the party to pay back money, — the original payment whereof was in the nature of an executed contract, — the reason is, that such payment was not purely voluntary, and was received in the other's wrong; so, to establish justice, the promise to refund is created.

§ 634. **Oral.** — A contract which cannot be enforced because not conformable to statutes requiring it to be in writing, is rendered, by voluntary execution, good;⁵ neither party can undo what has thus been done.⁶ Even execution on one side, if thereby the terms of the statute are satisfied, will render the oral promise binding; thus, when one has accepted a conveyance of land, he cannot avoid paying for it by showing that the contract of purchase was oral.⁷ Or, if the statute is not satisfied by the execution on one side, the party cannot be compelled to refund, so long as he is willing to carry out the parol bargain. If he refuses, then he must refund. The law creates the promise that he will.⁸

¹ *Elliott v. Swartwout*, 10 Pet. 137, *Mowatt v. Wright*, 1 Wend. 355; *Branham v. San José*, 24 Cal. 585; *Silliman v. Wing*, 7 Hill, N. Y. 159.

² *Manchester v. Burns*, 45 N. H. 482; *Bank of Commerce v. Union Bank*, 3 Comst. 230; *North v. Bloss*, 30 N. Y. 374; *Pearson v. Lord*, 6 Mass. 81; *Bond v. Hays*, 12 Mass. 34, 36; *Lazell v. Miller*, 15 Mass. 207; *Mowatt v. Wright*, 1 Wend. 355; *Burr v. Veeder*, 3 Wend. 412; *Dickins v. Jones*, 6 Yerg. 483.

³ Post, § 682, 725.

⁴ *Maxwell v. Griswold*, 10 How. U. S. 242; *Harmony v. Bingham*, 2 Kernan, 99, 109; *White v. Heylman*, 10 Casey,

Pa. 142; *Beckwith v. Frisbie*, 32 Vt. 559; *Elston v. Chicago*, 40 Ill. 514; *Harvey v. Olney*, 42 Ill. 336; *Quinnett v. Washington*, 10 Misso. 53.

⁵ *Sovereign v. Ortmann*, 47 Mich. 181. See *Young v. Royal Leamington Spa*, 8 App. Cas. 517.

⁶ *Cocking v. Ward*, 1 C. B. 858; *Freeman v. Headley*, 4 Vroom, 523.

⁷ *Galley v. Galley*, 14 Neb. 174.

⁸ *Beaman v. Buck*, 9 Sm. & M. 207; *Richards v. Allen*, 17 Maine, 296; *Congdon v. Perry*, 13 Gray, 3; *Bennett v. Phelps*, 12 Minn. 326; *Marsh v. Wyckoff*, 10 Bosw. 202; *Clancy v. Craine*, 2 Dev. Eq. 363.

§ 635. **Other Illustrations** — of the distinction between executory and executed contracts, and the effect of it, might be added in great numbers. But the doctrine sufficiently appears already; and the further illustrations, with various expansions of those here given, will be more serviceable in connection with the particular topics.

§ 636. *The Doctrine of this Chapter restated.*

In general, when a thing contracted for is performed, nothing of the bargain remains but its consequences. We call this an executed contract. Before the thing was done, the contract was termed executory. All obstructions to the execution, arising from defects or imperfections in the form or substance, are removed by the parties in their voluntary doing. If, in such doing, any equities between them have arisen, of a sort whereof the law can take cognizance, it will create a contract for their adjustment, but in most cases there are none.

CHAPTER XXIII.

FRAUD IN THE CONTRACT.

§ 637. Introduction.

638-640. Relations of Subject.

641-643. In General of Fraud.

644-649. As to Signing and Delivery.

650-670. In Substance of Contract.

671-691. Nature and Effect of Fraudulent Contract.

692. Doctrine of Chapter restated.

§ 637. **How Chapter divided.** — We shall consider, I. The Relations of this Subject to others; II. In General of Fraud; III. The Fraud which vitiates the Signing and Delivery; IV. The Fraud which vitiates the Substance of the Contract; V. The Nature and Effect of the Fraudulent Contract.

I. The Relations of this Subject to others.

§ 638. **The Principle** — on which depend the doctrines of this and several other chapters has already been stated to be, that, to constitute a contract made by the parties, not including herein the creations of the law,¹ they must concurrently assent to exactly the same thing at the same instant of time.² Now, —

§ 639. **What within Principle.** — Mental Incapacity, Coverture, and Infancy are severally within this principle, but they all differ from fraud. Similar to fraud, and in some particulars so nearly identical with it that the partition lines are scarcely, if at all, discernible, are Mistake, Duress or Compulsion, Undue Influence, and what by some is termed Misrepresentation.

¹ Ante, § 184.

² Ante, § 313; post, § 693.

Weakness of Intellect, Fiduciary Relations, and various other like things mingle with these.

§ 640. **Divisions of Subject.** — Some authors and many readers make a great point of classification; that is, of the manner in which, from pleasure or fancy, the law being seamless and knowing no divisions,¹ the expositions of a larger topic are divided into inferior titles. The present author takes the liberty of following, on every such question, the course indicated by the particular matter in hand as convenient, perspicuous, and effective in demonstration. In the present instance, misrepresentation, if dishonest, is fraud; if honest, it is mistake; weakness of intellect, standing alone, is insanity; mingled with fraud, it is both; undue influence has a doctrine of its own, while yet it blends with weakness of intellect and with fraud. These are but illustrations. The reader will see that, while we have here some distinct partition lines, there are other places at which the contact between the different sub-topics will not bear even this name, they are as truly one as the undivided sea. To undertake an apparent partition, where the nature of things has forbidden that any should be, and demand of the reader to call it scientific, would be simply ridiculous. The author, craving the pardon of any reader who may ask for what does not exist, and what does not admit of being created, will proceed with the expositions after such divisions as may seem to him convenient.

II. *In General of Fraud.*

§ 641. **Throughout Law.** — There is believed to be no assignable limit beyond which fraud is destitute of legal effect.² It vitiates every transaction, whether of contract, of judicial proceeding, or otherwise, into which it enters.³ “Fraud and deceit, by him who is trusted, are most odious in law.” “The common law doth so abhor fraud and covin that all acts, as well judicial as others, and which of themselves are

¹ Ante, § 490.

² Yet, as to fraud on a legislature, see Bishop Written Laws, § 38.

³ Jones v. Emery, 40 N. H. 348.

just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful.”¹

§ 642. **In Law of Contracts.** — When a man gives formal consent to a thing, impelled thereto by representations which he is induced to accept as facts, while they are not such, his act is not what it appears to be. His will does not coincide with what outwardly he does. He consents to the thing which is not, but not to the thing which is. And the party responsible for this wrong and its effect² cannot avail himself of any supposed right growing out of the mockery of a contract;³ for *nemo ex proprio dolo consequitur actionem*, no one is permitted to extract a right from his own wrong.⁴ Hence —

§ 643. **Defined.** — We may define the fraud now under consideration to be any spoken or acted falsehood, whereby one is induced to enter into what in form is a contract, under the belief that it is a different thing from what it is, or that there is for it a motive which does not in truth exist.

III. *The Fraud which vitiates the Signing and Delivery.*⁵

§ 644. **Elsewhere.** — We saw, in a preceding chapter,⁶ what are the signing and delivery which transmute written stipulations into a contract, and incidentally something of fraud therein.

§ 645. **Procured by Fraud.** — If such signing and delivery are procured from one of the parties who is in the exercise of due care,⁷ by the other's fraud, causing him to believe that the writing is something different from what it is, he is not in law bound thereby.⁸ Nor is one bound who, in like

¹ *Fermor's Case*, 3 Co. 77 a, 78 a, 79 b.

² *Vass v. Riddick*, 89 N. C. 6; *Perley v. Catlin*, 31 Ill. 533.

³ *Central Bank v. Copeland*, 18 Md. 305; *Mead v. Bunn*, 32 N. Y. 275, 278; *Duncan v. McCullough*, 4 S. & R. 483.

⁴ *Fisher v. Saylor*, 28 Smith, Pa. 84.

⁵ Compare with ante, § 342-348.

⁶ Ante, § 335 et seq.

⁷ *De Camp v. Hamma*, 29 Ohio State, 467; *Robinson v. Glass*, 94 Ind. 211;

Anderson v. Warne, 71 Ill. 20; *Hopkins v. Hawkeye Ins. Co.* 57 Iowa, 203; *Weaver v. Carpenter*, 42 Iowa, 343. For some distinctions, see ante, § 346. And see post, § 648, 655.

⁸ Ante, § 346; *Jones v. Austin*, 17 Ark. 498; *Byers v. Daugherty*, 40 Ind. 198; *Laidla v. Loveless*, 40 Ind. 211; *Selden v. Myers*, 20 How. U. S. 506; *Foy v. Haughton*, 83 N. C. 467; *Davis v. Snider*, 70 Ala. 315; *Resh v. Allentown Bank*, 12 Norris, Pa. 397; *May v.*

circumstances, accepts a deed with a clause imposing an obligation on him.¹ Now, —

§ 646. **Third Person — (Void).** — When a party has thus in form, impelled by fraud, put his name to something different from what he meant, he has not truly executed any contract. And his position toward the writing is not the same as though, under a purpose to sign it created by the like fraud, he had still subscribed to what he intended, — to be explained under our next sub-title. If the reader will consult some previous sections,² he will see that on nearly or exactly this question there are differences of judicial opinion. But, guided by the greater number of the cases now before the author, and, equally with them, by principles of the law whose effect can probably be intercepted only by special circumstances, we are conducted to the following. Such a contract is not merely voidable, it is void.³ Being in the nature of a forgery, not even an innocent third person can take under it any benefit.⁴ To illustrate, —

§ 647. **Negotiable Paper.** — Though the law goes far to protect innocent third persons in their rights to negotiable paper valueless as between the original parties, yet bills and notes brought into existence by the fraud now under consideration, and without laches in their makers, are, like forged paper, void as well in the hands of an innocent holder as of the original payee.⁵ As a qualification of this, —

§ 648. **Negligence** — in the maker,⁶ in putting his name to such paper, will, at least by some opinions, estop him from setting up this defence when sued by a holder who is without fault.⁷ And —

Seymour, 17 Fla. 725 ; Strong v. Livingston, 8 Bradw. 436.

¹ Albany City Sav. Inst. v. Burdick, 87 N. Y. 40.

² Ante, § 346, 348.

³ Hunter v. Walters, Law Rep. 7 Ch. Ap. 75, 81 ; Stacy v. Ross, 27 Texas, 3 ; Rovegno v. Defferari, 40 Cal. 459.

⁴ Thoroughgood's Case, 2 Co. 9 a ; Foster v. Mackinnon, Law Rep. 4 C. P. 704 ; In re Cooper, 20 Ch. D. 611.

⁵ Kellogg v. Steiner, 29 Wis. 626 ; Whitney v. Snyder, 2 Lans. 477 ; Corby v. Weddle, 57 Misso. 452 ; Munson v. Nichols, 62 Ill. 111 ; Butler v. Carns, 37 Wis. 61 ; Briggs v. Ewart, 51 Misso. 245 ; Woods v. Hynes, 1 Scam. 103 ; Vanbrunt v. Singley, 85 Ill. 281.

⁶ But see, as to negligence in these cases generally, ante, § 645. Compare with Redgrave v. Hurd, 20 Ch. D. 1, 13.

⁷ Nebeker v. Cutsinger, 48 Ind.

§ 649. **Contrary Doctrine.** — There is some authority for holding, in the ordinary case, the party who has thus been seduced by fraud into the signing of negotiable paper, responsible to the innocent possessor for value.¹

IV. *The Fraud which vitiates the Substance of the Contract.*

§ 650. **Doctrine in Epitome.** — A contract is fraudulent as against one who, whether acting personally or through another for whose doings therein he is responsible, causes, by misrepresentations of material facts, by silence where legal duty requires him to speak, or by any other undue means, the other party to enter into it, believing and moved by the unreal, thus falsely made to appear as real. Not all fraudulent contracts are within the exact form of this proposition,² but all are within the principle. To illustrate, —

§ 651. **Active Misrepresentation.** — The common case is where the defrauding party tells the other what he knows to be untrue regarding the subject of a bargain in negotiation; as, that a horse is sound when it is not,³ that the income from the thing is greater than it is,⁴ that the soil of land in question is productive⁵ or the neighborhood is healthy⁶ beyond the fact, that persons named have embarked in the enterprise while they have not,⁷ that no other creditors are to be paid

436. And see *Foster v. Mackinnon*, Law Rep. 4 C. P. 704; *Spurgin v. Traub*, 65 Ill. 170.

¹ *Kimble v. Christie*, 55 Ind. 140; *Draper v. Cowles*, 27 Kan. 484. And see ante, § 346, 348.

² For example, *Hulett v. Fairbanks*, 40 Ohio State, 233; *Darst v. Thomas*, 87 Ill. 222; *Gross v. McKee*, 53 Missis. 536. **Transfer of Stock.** — A shareholder in a national bank, knowing it was about to fail, transferred, to escape liability, his shares to an irresponsible third person; and this was adjudged to be a fraud, leaving him still liable. *Bowden v. Johnson*, 107 U. S. 251.

³ *Myton v. Thurlow*, 23 Kan. 212; *Jones v. Edwards*, 1 Neb. 170.

⁴ *Crosland v. Hall*, 6 Stew. Ch. 111; *Smith v. Land and House Prop. Corp.* 28 Ch. D. 7; *Arbuckle v. Biederman*, 94 Ind. 168; *Hutchinson v. Morley*, 7 Scott, 341, 3 Jur. 288.

⁵ *Messer v. Smyth*, 59 N. H. 41; *Hopkins v. Snedaker*, 71 Ill. 449; *Rhoda v. Annis*, 75 Maine, 17.

⁶ *Holmes's Appeal*, 27 Smith, Pa. 50.

⁷ *Penn Mut. Life Ins. Co. v. Crane*, 134 Mass. 56; *Hedden v. Griffin*, 136 Mass. 229.

more than those compromised with,¹ and numberless other things of the like sort.²

§ 652. **Relevant and Material.** — The misrepresentations must relate to the subject of the contract; independent ones, as to some disconnected thing, not being sufficient.³ But they need not be directly related; they will suffice if so closely connected that, but for them, the party would not have entered into it.⁴ And they must be of material facts, properly constituting an inducement,⁵ though not necessarily the sole inducement, to the contract.⁶

§ 653. **Believed and Causing.** — If a misrepresentation is not believed, plainly it has no effect. And, to impair a contract, it must, in fact, have produced the party's consent. The presumption is that it did; still, if the contrary is shown, — as, for example, if the real fact appears by the evidence to have been known to the other party, — it is without legal effect. To move a court, injury must attend the fraud.⁷ Still, —

§ 654. **Other Inducements Concurring.** — It is not essential that the believed falsity should have been the only inducement to the contract; it suffices that, without it, the consent would not have been given. Such is the rule in the criminal

¹ *Baldwin v. Rosenman*, 49 Conn. 105. See *Bebout v. Bodle*, 38 Ohio State, 500; *Elfelt v. Snow*, 2 Saw. 94.

² For example, *Gove v. Colborn*, 10 Stew. Ch. 319; *In re Great Berlin Steamboat Co.* 26 Ch. D. 616; *Broad v. Munton*, 12 Ch. D. 131; *Cowley v. Dobbins*, 136 Mass. 401; *Meyers v. Funk*, 56 Iowa, 52; *School Directors v. Boomhour*, 83 Ill. 17; *Lindauer v. Hay*, 61 Iowa, 663.

³ *Ingram v. Jordan*, 55 Ga. 356. See, also, *Pollock Con.* 484–486.

⁴ *Canham v. Barry*, 15 C. B. 597, 1 Jur. n. s. 402.

⁵ And see post, § 670.

⁶ *Hull v. Fields*, 76 Va. 594; *Winter v. Bandel*, 30 Ark. 362; *Righter v. Roller*, 31 Ark. 170; *Safford v. Grout*, 120 Mass. 20; *Selma, &c. Railroad v. Anderson*, 51 Missis. 829; *Hill v. Car-*

ley, 8 Hun, 636; *Cornfoot v. Fowke*, 6 M. & W. 358.

⁷ *Cunningham v. Shields*, 4 Hayw. 44, 46; *Casey v. Allen*, 1 A. K. Mar. 465; *Fishback v. Miller*, 15 Nev. 428; *Gunby v. Sluter*, 44 Md. 237; *Meyer v. Yesser*, 32 Ind. 294; *Bailey v. Smock*, 61 Misso. 213; *People v. Cook*, 4 Selden, 67, 79; *Castleman v. Griffin*, 13 Wis. 535; *Anderson v. Burnett*, 5 How. Missis. 165; *Ely v. Stewart*, 2 Md. 408; *Pollock Con.* 480, and English cases cited by him; as *Attwood v. Small*, 6 Cl. & F. 232, 395, 444; *Smith v. Kay*, 7 H. L. Cas. 750, 775, 776; *Horsfall v. Thomas*, 1 H. & C. 90, mentioned in *Smith v. Hughes*, Law Rep. 6 Q. B. 597, 605; *Williams's Case*, Law Rep. 9 Eq. 225, note; *Watson v. Charlemont*, 12 Q. B. 856, 864; and some others. See *Moens v. Heyworth*, 10 M. & W. 147.

law of false pretences,¹ and the reasons are exactly the same in the law of civil fraud.²

§ 655. **Carelessness in Believing.**— If the party to whom the misrepresentation was made had the means of verifying the facts, the conclusion will be the more easily drawn that, availing himself of his opportunities, he did verify them, and therefore did not act upon the falsehood.³ Still, in matter of law, should he have chosen to rely on the misrepresentation without inquiry and without suspicion, it will avail him in an allegation of fraud. Not even the exercise of ordinary care is, in such a case, indispensable.⁴ We have seen that the doctrine is not quite so when applied to the formal execution of the contract.⁵ The question doubtless presents some difficulties which further adjudications, it is to be hoped, may remove. Returning to the inquiry within this sub-title, the reposing of undue confidence, or the temporary absence of ordinary caution, by a person of average shrewdness, business capacity, circumspection, and suspicion should, in reason, be no more unfavorably regarded than general —

§ 656. **Weakness of Intellect — (Drunkenness).**— If the mind of the person to whom the fraud was addressed was weak, and especially if it was verging toward insanity, or if he was drunk, the fraud may thereby be rendered complete when otherwise, under the circumstances, it would not be.⁶ A question something like the one in this section and the last

¹ 2 Bishop Crim. Law, § 461.

² And see Leake Con. 2d ed. 379. "It is not sufficient for him to show that there were other representations or inducements in operation without further proving that the agreement was due to them only, to the entire exclusion of the false representation." Referring, "See per Turner, L. J., in Nicol's Case, 3 DeG. & J. 387, 28 L. J. C. 257, 270."

³ Hallows v. Fernie, Law Rep. 3 Ch. Ap. 467, 477; Downes v. Ship, Law Rep. 3 H. L. 257, 270.

⁴ Jones v. Rimmer, 14 Ch. D. 588, 592; Hitchins v. Pettingill, 58 N. H. 3; Redgrave v. Hurd, 20 Ch. D. 1, 13; Central Railway v. Kisch, Law Rep. 2

H. L. 99, 120; 2 Chit. Con. 11th Am. ed. 1040, 1041; Leake Con. 2d ed. 380-383.

⁵ Ante, § 645, 646, 648.

⁶ Owings's Case, 1 Bland, 370; Dodds v. Wilson, 1 Tread. 448, 3 Brev. 389; *Somes v. Skinner*, 16 Mass. 348, 358; *Neely v. Anderson*, 2 Strob. Eq. 262; *Cadwallader v. West*, 48 Misso. 483; *Cain v. Warford*, 33 Md. 23; *Calloway v. Witherspoon*, 5 Ire. Eq. 128; *Birdsong v. Birdsong*, 2 Head, 289; *Davidson v. Carter*, 55 Iowa, 117, 119; *Griffith v. Short*, 14 Neb. 259; *Shaw v. Ball*, 55 Iowa, 55; *Storrs v. Scougale*, 48 Mich. 387; *Spargur v. Hall*, 62 Iowa, 498.

has arisen in the criminal law of false pretences. It was once thought by some that, if the falsehood was uttered to a weak and credulous person who was misled to act upon it, no indictment would lie unless it was of a character adapted to mislead one of ordinary capacity and prudence; but the law is now settled otherwise, and the single question is whether or not it did in fact mislead, though there may be pretences too frivolous for the law to notice.¹ So —

§ 657. **Ignorant.** — The like reasoning applies where the person is ignorant, either generally, or of the particular subject.² Also —

§ 658. **Confidential Relations.** — It is the same where the parties are in confidential relations; less of fraud will be required than in other circumstances.³

§ 659. **False — (Nature of Falsity).** — What is said must be false. And its falsity as viewed by the law will depend, not on the mere literal words, but on the effect which, in their just interpretation, and operating in connection with the conduct of the defrauding party and with the other circumstances, they were adapted to produce on the mind addressed. The literal truth may be a falsehood, because not the whole truth; in which case, and others of the like sort, it will be sufficient on a charge of fraud.⁴ Hence —

§ 660. **Concealment.** — The concealment of a fact which one ought, as a legal duty, to disclose, is in law a fraudulent representation.⁵ The “duty of mutual disclosure” occupies

¹ 2 Bishop Crim. Law, § 433–436.

² Keller v. Equitable Fire Ins. Co. 28 Ind. 170; Nevitt v. Bank of Port Gibson, 1 Freeman, Missis. 438; Decker v. Hardin, 2 Southard, 579; Smith v. Click, 4 Humph. 186; Turner v. Johnson, 2 Cranch C. C. 287; Gould v. Oke-den, 4 Bro. P. C. 198.

³ Yosti v. Laughran, 49 Misso. 594; Harkness v. Fraser, 12 Fla. 336; Shaeffer v. Sleade, 7 Blackf. 178; Mullins v. McCandless, 4 Jones Eq. 425; Birdsong v. Birdsong, 2 Head, 289; Whelan v. Whelan, 3 Cow. 537; Conant v. Jackson, 16 Vt. 335; Kennedy v. Kennedy, 2 Ala. 571.

⁴ Oakes v. Turquand, Law Rep. 2 H. L. 325, 342, 343; Mulligan v. Bailey, 28 Ga. 507; Denny v. Gilman, 26 Maine, 149; Buford v. Caldwell, 3 Misso. 477.

⁵ Smith v. Ætna Life Ins. Co. 49 N. Y. 211; Mitchell v. McDougall, 62 Ill. 498; Wintz v. Morrison, 17 Texas, 372; Belden v. Henriques, 8 Cal. 87; Grove v. Hodges, 5 Smith, Pa. 504; Van Arsdale v. Howard, 5 Ala. 596; Barnett v. Stanton, 2 Ala. 181; Truebody v. Jacobson, 2 Cal. 269; Aortson v. Ridgway, 18 Ill. 23; Junkins v. Simpson, 14 Maine, 364; McAdams v. Cates, 24 Misso. 223; Trigg v. Read, 5

a considerable number of pages in Kent's Commentaries,¹ condensed as that work is; and altogether it constitutes a voluminous title in the law. Moral and legal "duty" are, in this matter, in some particulars quite divergent; the law, to sharpen wits,² and for some other reasons, permitting men to be in some circumstances far too astute in their bargainings to satisfy a just morality. We shall see more of the law's lines, on this subject, in various connections.

§ 661. **Knowledge of Falsity — (Intent — Carelessness).** — The vitiating effect of the fraud often or commonly proceeds from a combination of things, not from one thing alone. And as the remedy is civil, not criminal, the misrepresentation need not be such a false pretence as would justify an indictment. Always, therefore, the consideration is important, and it is often the controlling one, that the party knew his affirmations to be false, if such was the fact;³ but, on the other hand, if he did not care, or if he acted recklessly,⁴ or even if he was innocently misinformed, there are many circumstances in which they will be adequate.⁵ It is difficult, probably impossible, to lay down such rules as will, in all circumstances, be safe guides, distinguishing these classes of cases. For example, —

§ 662. **Mistake — (Legal Fraud — Moral).** — It is sometimes said to be the present doctrine, overruling former opinions, that there is no such thing as legal, in the absence of moral,

Humph. 529; Dickenson v. Davis, 2 805, 820, 8 Jur. 345; Joliffe v. Baker, Leigh, 401; Parker v. Marquis, 64 11 Q. B. D. 255.

Misso. 38; Meade v. Webb, 1 Bro. P. C. 4 Parmlee v. Adolph, 28 Ohio State, 308; Bowles v. Stewart, 1 Sch. & Lef. 10. And see Bainbrigge v. Moss, 3 Jur. 209; Ryan v. Ashton, 42 Iowa, 365; n. s. 58, 62, note.

Tyrrell v. Hope, 2 Atk. 558. 5 Stone v. Covell, 29 Mich. 359;

¹ 2 Kent Com. 482-491.

² 1 Bishop Crim. Law, § 11.

³ Hubbell v. Meigs, 50 N. Y. 480; Wakeman v. Dalley, 51 N. Y. 27; Hall v. Bradbury, 40 Conn. 32; Miller v. Mutual Benefit Ins. Co. 31 Iowa, 216; Hopper v. Sisk, 1 Ind. 176; Campbell v. Hillman, 15 B. Monr. 508; Ball v. Lively, 4 Dana, 369; McDonald v. Trafton, 15 Maine, 225; Stone v. Denny, 4 Met. 151; Collins v. Evans, 5 Q. B. 805, 820, 8 Jur. 345; Joliffe v. Baker, 11 Q. B. D. 255. ⁴ Parmlee v. Adolph, 28 Ohio State, 10. And see Bainbrigge v. Moss, 3 Jur. n. s. 58, 62, note. ⁵ Stone v. Covell, 29 Mich. 359; Frenzel v. Miller, 37 Ind. 1; Elder v. Allison, 45 Ga. 13; Smith v. Richards, 13 Pet. 26; Smith v. Babcock, 2 Woodb. & M. 246; Foster v. Kennedy, 38 Ala. 359; Terhune v. Dever, 36 Ga. 648; Harding v. Randall, 15 Maine, 332; Bennett v. Judson, 21 N. Y. 238; Hubbard v. Briggs, 31 N. Y. 518, 540; Bacon v. Bronson, 7 Johns. Ch. 194; Donelson v. Young, Meigs, 155; Graves v. Lebanon National Bank, 10 Bush, 23.

fraud ; so that, though a party states a material fact untruly, if he innocently believed it to be true, he is not responsible,¹ — a proposition not always laid down in terms quite so broad.² And, in reason, this must be so in the civil action for deceit ;³ because, where one party uses his best endeavor to give the other information sought, it would violate justice should he be compelled to pay damages for a mistake he could not avoid.⁴ But, under the head of “Mistake,” in another chapter, we shall see that contracts are often set aside or reformed against a party free from all imputation of intentional deceiving. And, in various aspects, a contract is bad where a party is induced to enter into it by the innocent misstatements of facts by the other.⁵ So that —

§ 663. **Representation**, — or misrepresentation, viewed as distinct from intentional fraud, is sometimes put forward as a separate head in the treatment of the law of contracts.⁶ “A representation is ;” said a learned judge, “a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it.”⁷ The representation may be a part of the terms of the contract⁸ or it may remain separate ; it may constitute a warranty or it may not, as the facts of the particular case disclose ; and there are some other distinctions. But it is believed that, in the present work, all will sufficiently appear under other heads.

§ 664. **Lying in Trade**. — The law, departing from the rule in morals,⁹ tolerates a good deal of lying in trade, when in the nature of merely puffing one’s own goods or depreciating those

¹ Joliffe v. Baker, 11 Q. B. D. 255, where the English cases are widely cited and reviewed.

² 2 Chit. Con. 11th Am. ed. 1044 ; Leake Con. 370.

³ Which was the case of Joliffe v. Baker, *supra*. And see post, § 685.

⁴ Taylor v. Leith, 26 Ohio State, 428 ; Freeman v. Baker, 5 B. & Ad. 797, 805, 807. See Brownlee v. Hewitt, 1 Misso. Ap. 360. But see Bird v. Kleiner, 41 Wis. 134 ; compare with Joliffe v. Baker, *supra*.

⁵ Mulvey v. King, 39 Ohio State, 491 ; Day v. Lown, 51 Iowa, 364 ; Hart v. Swaine, 7 Ch. D. 42. See Hunt v. Blanton, 89 Ind. 38.

⁶ 4 Fisher Dig. 8558 ; Pollock Con. 461.

⁷ Williams, J. in Behn v. Burness, 3 Best & S. 751, 753.

⁸ *Ib.* ; In re Banister, 12 Ch. D. 131, 148.

⁹ Ante, § 660.

of another;¹ provided the thing bargained about reveals its own qualities, and is open to the parties' equal inspection.² But if there is in a chattel,³ or in the title to real estate,⁴ some defect not open to inspection, the seller should disclose it to one who proposes to buy; and, if to gain an advantage he forbears to do this, the sale is voidable for the fraud. And the same effect is produced by a fraudulent representation concerning some specific fact, which could be ascertained by examination or inquiry; if it is positively uttered, and the purchaser relies on it, and consequently forbears to examine or inquire, the transaction becomes voidable for the fraud.⁵ The distinction, in such a case, is between positive lying and mere silence; for, if a fact, or the quality of a thing offered for sale, is equally within the power of the parties to ascertain, the law does not require the seller to disclose what he knows, though he is informed, and is aware that the other party is not. But often a single positive word will carry the case across the line, and establish fraud.⁶ One party is not even required to answer what the other asks; but, if he does, he must speak truly.⁷ Again, —

§ 665. **Opinion — Promise — Law.** — In the criminal law of false pretences, a mere opinion or a promise, unaccompanied by any assertion of fact, is not indictable.⁸ And the like rule

¹ Met. Con. 34; ante, § 244; Barlow v. Wiley, 3 A. K. Mar. 457.

² Hill v. Bush, 19 Ark. 522; Bell v. Henderson, 6 How. Missis. 311; Armstrong v. Huffstutler, 19 Ala. 51; Horsfall v. Thomas, 1 H. & C. 90, 8 Jur. n. s. 721; Poland v. Brownell, 131 Mass. 138.

³ Turner v. Huggins, 14 Ark. 21; Hanks v. McKee, 2 Litt. 227; Patterson v. Kirkland, 34 Missis. 423; Bigler v. Flickinger, 5 Smith, Pa. 279; Dowling v. Lawrence, 58 Wis. 282.

⁴ Bryant v. Boothe, 30 Ala. 311; Glasscock v. Minor, 11 Misso. 655; Hays v. Bonner, 14 Texas, 629. See Ward v. Wiman, 17 Wend. 193; Moreland v. Atchison, 19 Texas, 303.

⁵ Central Railway v. Kisch, Law Rep. 2 H. L. 99; Lord Ellenborough in Vernon v. Keys, 12 East, 632, 637;

Hazard v. Irwin, 18 Pick. 95; Pringle v. Samuel, 1 Litt. 43; Holland v. Anderson, 38 Misso. 55; Newell v. Horn, 45 N. H. 421; Roosevelt v. Dale, 2 Cow. 129; Litchfield v. Hutchinson, 117 Mass. 195; Mead v. Bunn, 32 N. Y. 275.

⁶ Laidlaw v. Organ, 2 Wheat. 178; Dillard v. Moore, 2 Eng. 166; Smith v. Hughes, Law Rep. 6 Q. B. 597; Harris v. Tyson, 12 Harris, Pa. 347; Hobbs v. Parker, 31 Maine, 143; Bell v. Byerson, 11 Iowa, 233.

⁷ Blydenburgh v. Welsh, Bald. 331; Eichelberger v. Barnitz, 1 Yeates, 307; Kintzing v. McElrath, 5 Barr, 467; Butler's Appeal, 2 Casey, Pa. 63; In re Ford, 10 Ch. D. 365.

⁸ 2 Bishop Crim. Law, § 413, 424, 427, 429, 429 a, 450, 454.

applies, perhaps not quite so strictly, to civil frauds. Nor, as all persons are conclusively presumed to know the law,¹ will a misstatement of it impair the contract, unless the parties are in confidential relations.² An opinion as to the prospective results of a venture, for example, is within this rule.³ But a fraudulent representation that a railroad will be located at a particular place, whereby the party is induced to subscribe for its stock, has been held to release the subscriber.⁴ And a declaration that a note is as good as gold affirms the fact of the maker's solvency.⁵ Further, —

§ 666. **Value — (Cost).** — In general, a false affirmation of the value of an article is not counted as a fraud, being deemed a mere opinion.⁶ But it is otherwise of an assertion, on the sale of a judgment, that the debtor is solvent.⁷ And the seller's averment of what he gave for a thing is probably of the latter sort, though the cases are not quite harmonious or distinct.⁸ Again, —

§ 667. **As to Pay.** — If a man buys goods intending not to pay for them, his contract of purchase is fraudulent though he also promises.⁹ And it is the same if he falsely pretends to ability. But if he merely promises, while he knows he cannot pay, there is in law no fraud.¹⁰ Still, —

¹ Ante, § 462. See *Hirschfeld v. London, &c. Railway*, 2 Q. B. D. 1.

² *People v. San Francisco*, 27 Cal. 655; *Townsend v. Cowles*, 31 Ala. 428; *Russell v. Branham*, 8 Blackf. 277; *Gatling v. Newell*, 9 Ind. 572; *Sims v. Ferrill*, 45 Ga. 585; *Vernon v. Keys*, 12 East, 632; *Fenwick v. Grimes*, 5 Cranch C. C. 439; *Payne v. Smith*, 20 Ga. 654; *Hall v. Thompson*, 1 Sm. & M. 443; *Bridges v. Robinson*, 2 Tenn. Ch. 720; *Thomson v. Weems*, 9 Ap. Cas. 671; *Fouty v. Fouty*, 34 Ind. 433; *Harts-ville University v. Hamilton*, 34 Ind. 506; *Hardigree v. Mitchum*, 51 Ala. 151.

³ *Lake v. Security Loan Assoc.* 72 Ala. 207.

⁴ *Kent County Railroad v. Wilson*, 5 Houst. 49. See *New Brunswick, &c. Railway v. Conybeare*, 9 H. L. Cas. 711.

⁵ *Watson v. Picket*, 2 Mill, 222.

⁶ *Shade v. Creviston*, 93 Ind. 591; *Harvey v. Young*, Yelv. 21 a.

⁷ *Burr v. Willson*, 22 Minn. 206.

⁸ *Lindsay Petroleum Co. v. Hurd*, Law Rep. 5 P. C. 221; *Kent v. Freehold Land, &c. Co.* Law Rep. 4 Eq. 588; *Dishop v. Small*, 63 Maine, 12, and cases there cited.

⁹ *Dow v. Sanborn*, 3 Allen, 181; *Wiggin v. Day*, 9 Gray, 97; *Hall v. Naylor*, 6 Duer, 71; *King v. Phillips*, 8 Bosw. 603; *Hoffman v. Strohecker*, 7 Watts, 86; *Mackinley v. McGregor*, 3 Whart. 369; *O'Donald v. Constant*, 82 Ind. 212; *Houghtaling v. Hills*, 59 Iowa, 287; *Donaldson v. Farwell*, 93 U. S. 631.

¹⁰ *Bell v. Ellis*, 33 Cal. 620; *Buffington v. Gerrish*, 15 Mass. 156; *Kloppen-stein v. Mulcahy*, 4 Nev. 296; *Nichols*

§ 668. **Deceitful Promise.** — There is a deceitful promise, not meant to be performed, which is deemed a fraud.¹

§ 669. **Concurrent Warranty.** — That a party, while effecting a sale by fraud, also warrants the thing, does not take away the fraudulent character or consequences of the transaction.² Nor, on the other hand, will the fraud impair the right of action on the warranty.³

§ 670. **The Quantum of Fraud,** — necessary to vitiate a contract, cannot be the subject of a rule. It will depend much on the circumstances, but chiefly on the effect. Did the false utterance, and not something else, so far induce the consent that otherwise⁴ it would not have been given?⁵ Still the misrepresentation must be, not only relevant and material,⁶ but likewise not insignificant; thus, where a horse was sold with a warranty, accompanied by a falsehood as to the place whence it came, the court would not set aside the sale for this unimportant deception while it satisfied the warranty.⁷

V. *The Nature and Effect of the Fraudulent Contract.*

§ 671. **Not Void — Voidable.** — Whatever be the effect of a party's signing, entrapped by the other, a writing different from what he thinks he is executing,⁸ if he means to agree to the terms which in form he does, however moved thereto by fraud, the contract is not a nullity. The defrauding party is bound,⁹ and the defrauded may affirm it or recede therefrom

v. Pinner, 18 N. Y. 295; *Hennequin v. Naylor*, 24 N. Y. 139; *Backentoss v. Speicher*, 7 Casey, Pa. 324; *Griffin v. Chubb*, 7 Texas, 603; *Powell v. Bradlee*, 9 Gill & J. 220. See *Talcott v. Henderson*, 31 Ohio State, 162.

¹ *Miller v. Howell*, 1 Scam. 499; *Dowd v. Tucker*, 41 Conn. 197; *Kinard v. Hiers*, 3 Rich. Eq. 423; *Richardson v. Adams*, 10 Yerg. 273; *Farrar v. Bridges*, 3 Humph. 566.

² *Steward v. Coesvelt*, 1 Car. & P. 23; *Larey v. Taliaferro*, 57 Ga. 443.

³ *McGowen v. Myers*, 60 Iowa, 256.

⁴ *Ante*, § 654.

⁵ *Duncan v. Hogue*, 24 Missis. 671; *Story v. Norwich, &c. Railroad*, 24 Conn. 94; *Slidell v. Rightor*, 3 La. An. 199; *Peter v. Wright*, 6 Ind. 183; *Central Bank v. Copeland*, 18 Md. 305; *Smith v. Richards*, 13 Pet. 26; *Rhea v. Yoder*, Pr. Dec. 2d ed. 88; *Shackelford v. Hendley*, 1 A. K. Mar. 496.

⁶ *Ante*, § 652.

⁷ *Geddes v. Pennington*, 5 Dow, 159, a Scotch appeal. And see *Feret v. Hill*, 15 C. B. 207, 18 Jur. 1014.

⁸ *Ante*, § 645-649.

⁹ *Watts v. Brooks*, 3 Ves. 612.

as he chooses.¹ Hence it is not called void, the name for it is voidable.² Thus, —

§ 672. **Fraudulent Sale — (Passing Title).** — On a sale of goods³ or lands⁴ brought about by the fraud of the purchaser, a defeasible title in them passes to the latter.⁵ As to the defrauding party, the transaction is, as just said, unimpeachable; the one defrauded, on learning the truth, may declare it void or not at his election.⁶ Then, —

§ 673. **Innocent Purchaser.** — Should a third person, not knowing of the fraud, and not being put on his inquiry,⁷ buy, for an adequate, valuable consideration, the same goods or lands from the one who had thus obtained them through fraud, this defeasible title will thereby be made indefeasible, and he will hold them. For, as between the original seller

¹ Nealon v. Henry, 131 Mass. 153, 154; Myton v. Thurlow, 23 Kan. 212; White v. Garden, 10 C. B. 919, 15 Jur. 630.

² Oakes v. Turquand, Law Rep. 2 H. L. 325, 346, 375, 376; Pearsoll v. Chapin, 8 Wright, Pa. 9; Benedict v. National Bank, 4 Daly, 171; Urquhart v. Macpherson, 3 Ap. Cas. 831.

³ Clough v. London, &c. Railway, Law Rep. 7 Ex. 26, 34.

⁴ Somers v. Pumphrey, 24 Ind. 231.

⁵ Hoffman v. Noble, 6 Met. 68, 72; Rowley v. Bigelow, 12 Pick. 307, 312; Hamet v. Letcher, 37 Ohio State, 356, 358; Stevenson v. Newnham, 13 C. B. 285, 17 Jur. 600; White v. Garden, 10 C. B. 919, 15 Jur. 630; Moyce v. Newington, 4 Q. B. D. 32, 35. At the place last cited, Cockburn, C. J., said: "The reasoning on which this conclusion is based may not appear altogether consistent with principle; and, agreeing in the result, we should prefer to adopt the view of the American courts [conducting to the conclusion to be mentioned in the next section], as stated in the case of Root v. French, 13 Wend. 570, a case decided in the Supreme Court of judicature of the State of New York, according to which the preference thus given to the right of the innocent pur-

chaser is treated as an exception to the general law, and is rested on the principle of equity that, where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud." It is scarcely to be expected that an English court should do otherwise than deem whatever it finds set down in any one State of our Union to be "American" doctrine. Not all the other American courts have followed this New York reasoning, and whether or not any have, it will render the reader no service to inquire. Defeasible rights are among the most familiar things in the law; therefore it is difficult to discern in what consists the departure from principle, if there is any, in the reasoning of the text. When next we come to inquire whether the claims of an innocent third person or of the defrauded party shall be preferred, as working or not a defeasance, the New York reasoning, we are about to see, is pertinent. Nor, as thus explained, does any conflict between the two methods of reasoning remain.

⁶ Hoffman v. Noble, and other cases, supra; Lewis v. Cosgrave, 2 Taunt. 2.

⁷ Cooper v. Newman, 45 N. H. 339.

and the second purchaser, both of whom are innocent,¹ the law will cast the loss on him whose laches enabled the defrauder to transmit them to one not negligent.² Yet if the third person, when making his purchase, has knowledge of the fraud,³ or if he receives the thing in payment of a pre-existing debt,⁴ or otherwise without consideration,⁵ he is in no better position than the one with whom he dealt. Nor is the defrauder's assignee in bankruptcy in a better position than he,⁶ nor is a person who attaches the property as his.⁷ Again, —

§ 674. **Negotiable Paper.** — On the same principle, a *bona fide* holder for value of negotiable paper, originally obtained by the fraud now in contemplation, may enforce payment against the maker ;⁸ but one within any of the foregoing exceptions stands only in the position of the original defrauder.⁹ And —

¹ *Cundy v. Lindsay*, 3 Ap. Cas. 459, 463.

² *Jennings v. Gage*, 13 Ill. 610; *Rowley v. Bigelow*, 12 Pick. 307, 312; *Hoffman v. Noble*, 6 Met. 68; *Sinclair v. Healy*, 4 Wright, Pa. 417; *Sharp v. Jones*, 18 Ind. 314; *Hutchinson v. Watkins*, 17 Iowa, 475; *Collins v. Heath*, 34 Ga. 443; *Choteau v. Jones*, 11 Ill. 300; *Scarlett v. Gorham*, 28 Ill. 319; *Bartlett v. Henry*, 10 Johns. 185; *Coleman v. Satterfield*, 2 Head, 259; *Stevenson v. Newnham*, 13 C. B. 285, 17 Jur. 600; *White v. Garden*, 10 C. B. 919, 15 Jur. 630; *Kern v. Thurber*, 57 Ga. 172; *Moore v. Trimble*, 94 Ind. 153; *Moyce v. Newington*, 4 Q. B. D. 32, 14 Cox C. C. 182; *Clafin v. Cottman*, 77 Ind. 58; *Neal v. Gregory*, 19 Fla. 356; *Dickerson v. Evans*, 84 Ill. 451; *Fulton v. Woodman*, 54 Missis. 158; *Farmers Nat. Bank v. Fletcher*, 44 Iowa, 252; *Wynne v. Cornelison*, 52 Ind. 312; *Hurley v. Osler*, 44 Iowa, 642; *Bryan's Appeal*, 5 Out. Pa. 389.

³ *Crocker v. Crocker*, 31 N. Y. 507; *Shewmake v. Williams*, 54 Ga. 206. And see *Justh v. National Bank of Commonwealth*, 56 N. Y. 478.

⁴ *Root v. French*, 13 Wend. 570; *Wood v. Robinson*, 22 N. Y. 564. But see *Shufeldt v. Pease*, 16 Wis. 659; *Butters v. Haughwout*, 42 Ill. 18.

⁵ *Wade v. Saunders*, 70 N. C. 270; *Lillard v. Shannon*, 60 Misso. 522.

⁶ *Donaldson v. Farwell*, 93 U. S. 631; *Patton v. Campbell*, 70 Ill. 72.

⁷ *Wiggin v. Day*, 9 Gray, 97; *Hoffman v. Strohecker*, 7 Watts, 86. Contra, *Dickson v. Culp*, 9 Baxter, 57. See *Stearns v. Herrick*, 132 Mass. 114.

⁸ *Davis v. West Saratoga Building Union*, 32 Md. 285; *Hamilton v. Vought*, 5 Vroom, 187; *Park Bank v. Watson*, 42 N. Y. 490; *Riley v. Schwacker*, 50 Ind. 592; *Clark v. Thayer*, 105 Mass. 216; *Strough v. Gear*, 48 Ind. 100; In re *Great Western Telegraph*, 5 Bis. 363; *Culver v. Hide and Leather Bank*, 78 Ill. 625.

⁹ See, for various questions within this doctrine, *Southwick v. Memphis Bank*, 84 N. Y. 420; *Gridley v. Bane*, 57 Ill. 529; *Ormsbee v. Howe*, 54 Vt. 182.

§ 675. **Other Contracts** — likewise are governed by this principle. It will suffice to refer to a few cases.¹

§ 676. **Explanation and Distinctions** — (**Forgery — Stolen Goods**). — The reader should not overlook the distinctions on which we are proceeding. It is a familiar proposition that one who acquires a forged note, however honestly and for a consideration, is invested with nothing against the supposed maker;² and the purchaser of stolen goods, however blameless, cannot hold them against the owner.³ There may be various reasons for this; but a sufficient one is, that the injured person in these cases gave no consent to what was done, nor did even his carelessness contribute thereto. Yet where, in the cases above stated, the innocent and meritorious third party is protected, the defrauded person had, influenced as well by his own carelessness as by the other's fraud, consented to the transmission of the title or other right.⁴ Keeping in mind this distinction, we shall see that, for example, a purchaser from the grantee of a forged deed acquires nothing,⁵ and it is the same with the transferee of stock pursuant to a forged power of attorney,⁶ — a result directly the opposite of that in ordinary fraud. Hence, —

§ 677. **Innocent Purchaser, again.** — In the various circumstances liable to arise wherein, for example, a defrauded seller undertakes to transmit the title to some non-concurring third person, instead of to the defrauder, making the sale void, the innocent purchaser from the latter is not protected.⁷

§ 678. *As between the Parties* : —

Elect. — The defrauding party being bound by the contract

¹ *Sleeper v. Chapman*, 121 Mass. 404; *Urquhart v. Macpherson*, 3 Ap. Cas. 831; *Nealon v. Henry*, 131 Mass. 153; *Servis v. Cooper*, 4 Vroom, 68; *Scholefield v. Templer*, Johns. Ch. Eng. 155, 5 Jur. n. s. 619, 4 De G. & J. 429; *Cameron v. Romele*, 53 Texas, 238; *Alexander v. The State*, 56 Ga. 478; *Dey v. Dey*, 11 C. E. Green, 182.

² *Brooks v. Warwick*, 2 Stark. 389; *Memphis, &c. Railroad v. Chastine*, 54 Missis. 503; *Maas v. Missouri, &c. Railroad*, 83 N. Y. 223. And see post, § 699.

³ *Mowrey v. Walsh*, 8 Cow. 238; *Robinson v. Skipworth*, 23 Ind. 311; *Dodd v. Arnold*, 28 Texas, 97.

⁴ Ante, § 671–673; *White v. Garden*, 10 C. B. 919, 15 Jur. 630.

⁵ *Gray v. Jones*, 14 Fed. Rep. 83.

⁶ *Davis v. Bank of England*, 2 Bing. 393, 9 Moore, 747.

⁷ *Hamet v. Letcher*, 37 Ohio State, 356. And consult *Clarke v. Shee*, Cowp. 197; *Abbotts v. Barry*, 2 Brod. & B. 369, 371, 372.

if the other chooses to hold him,¹ the latter may make his election² out of a considerable number of steps, some of which are inconsistent with others, so that the election of one may exclude another. An obvious one of these steps is —

§ 679. **Rescission.** — This term denotes the avoiding of a voidable contract. The party who finds himself defrauded may, unless some obstacle intervenes, rescind it if he chooses.³ But as the rights of innocent third persons, acquired for value, cannot be affected thereby,⁴ if they have attached he is too late to rescind.⁵ Nor can he rescind when, from any other cause, the parties cannot thereon be placed *in statu quo*.⁶ The rule as to which placing *in statu quo* is, that the one proceeding to rescind must either give back or offer to return whatever of any value to himself or the other he has received under the contract, yet he need not include in this what is without possible benefit.⁷ To illustrate, — where worthless lime in casks was sold for good, it was held that the lime need not be returned on a rescission, but the casks must be.⁸ There are cases so exceptional in their nature that no offer to return the thing need, it appears, precede the bringing of the suit; but such is not the general rule.⁹ Obviously there cannot be a part affirmance and part rescission;¹⁰ as, for example, by retaining the price and avoiding the conveyance.¹¹ A rescis-

¹ Ante, § 671.

² Ante, § 672; *Parker v. Marquis*, 64 Misso. 38; *Byard v. Holmes*, 4 Vroom, 119; *Dietz v. Sutcliffe*, 80 Ky. 650.

³ *Dauchy v. Silliman*, 2 Lans. 361; *Gates v. Bliss*, 43 Vt. 299; *Hall v. Fullerton*, 69 Ill. 448; *Holbrook v. Burt*, 22 Pick. 546; *Foster v. Gressett*, 29 Ala. 393; *Cook v. Moore*, 39 Texas, 255; *Yeoman v. Lasley*, 40 Ohio State, 190; *Jones v. Emery*, 40 N. H. 348; *Davis v. Henry*, 4 W. Va. 571; *Leeds v. Boyer*, 59 Ind. 289; *Dietz v. Sutcliffe*, 80 Ky. 650.

⁴ Ante, § 673-675.

⁵ *Oakes v. Turquand*, Law Rep. 2 H. L. 325.

⁶ *Potter v. Titcomb*, 22 Maine, 300; *Hendrickson v. Hendrickson*, 51 Iowa, 68; *Montgomery v. Gibbs*, 40 Iowa, 652.

⁷ *Lane v. Latimer*, 41 Ga. 171; *Sanborn v. Batchelder*, 51 N. H. 426; *Perley v. Balch*, 23 Pick. 283; *Thurston v. Blanchard*, 22 Pick. 18, 20; *Beetm v. Burkholder*, 19 Smith, Pa. 249; *Underwood v. West*, 52 Ill. 397; *Manahan v. Noyes*, 52 N. H. 232; *Gould v. Cayuga Bank*, 21 Hun, 293; *Demorest v. Eastman*, 59 N. H. 65; *Herman v. Haffenegger*, 54 Cal. 161.

⁸ *Conner v. Henderson*, 15 Mass. 319.

⁹ *Clough v. London, &c. Railway*, Law Rep. 7 Ex. 26; *Smith v. Salomon*, 7 Daly, 216; *Smith v. Holyoke*, 112 Mass. 517.

¹⁰ *Kellogg v. Turpie*, 93 Ill. 265; *Bishop v. Stewart*, 13 Nev. 25.

¹¹ *Burgett v. Teal*, 91 Ind. 260.

sion *in pais*, procured by fraud, may itself be rescinded.¹ Moreover, —

§ 680. **Time of Rescission.** — According to most of the cases, the rescission must be prompt, or within a reasonable time after the discovery of the fraud.² Plainly, where there has been an act of acquiescence with full knowledge of the facts, it comes too late.³ And, unless barred by the Statute of Limitations, it is never too late while the fraud remains undiscovered.⁴ The party, likewise, is given time to inquire into and ascertain his legal rights.⁵ The circumstances of cases vary, and it is impossible to set down in numbers the months or years within which a suit must be brought. In one case, four years were adjudged too long ;⁶ in another, the lapse of six years was deemed a consideration to be submitted to the jury ;⁷ in another, six months were held not to be a bar ;⁸ in another, five months unexplained were deemed too long a time to wait.⁹ And it has been adjudged in England that mere delay does not take away the right, being material only as it furnishes evidence of an election to affirm.¹⁰

§ 681. **Notice of Rescission.** — It is sometimes said that the rescission must be with notice to the other party.¹¹ Doubtless if anything is to be returned, it should be with a state-

¹ Byers v. Chapin, 28 Ohio State, 300; Jones v. Booth, 38 Ohio State, 405.

² Manahan v. Noyes, 52 N. H. 232; Hall v. Fullerton, 69 Ill. 448; Oakes v. Turquand, Law Rep. 2 H. L. 325; Williams v. Ketchum, 21 Wis. 432; Fratt v. Fiske, 17 Cal. 380; Barfield v. Price, 40 Cal. 535; Shaw v. Barnhart, 17 Ind. 183; Fisher v. Wilson, 18 Ind. 133; Cook v. Gilman, 34 N. H. 556; Desha v. Robinson, 17 Ark. 228; Lawrence v. Dale, 3 Johns. Ch. 23; Gates v. Bliss, 43 Vt. 299; Bruce v. Davenport, 1 Abb. Ap. Dec. 233; Hunt v. Hardwick, 68 Ga. 100; Memphis, &c. Railroad v. Neighbors, 51 Missis. 412; Gould v. Cayuga Bank, 86 N. Y. 75; Wingate v. Neidlinger, 50 Ind. 520; Samuels v. King, 50 Ind. 527; Lawrenceburgh Nat. Bank v. Stevenson, 51 Ind. 594.

³ Evans v. Montgomery, 50 Iowa,

325; McCreary v. Parsons, 31 Kan. 447; St. John v. Hendrickson, 81 Ind. 350; Byrne v. Hibernia Bank, 31 La. An. 81.

⁴ Preceding cases; also Kraus v. Thompson, 30 Minn. 64.

⁵ Torrance v. Bolton, Law Rep. 8 Ch. Ap. 118, 124.

⁶ Aaron v. Mendel, 78 Ky. 427.

⁷ Davis v. Stuard, 3 Out. Pa. 295.

⁸ Marston v. Simpson, 54 Cal. 189.

⁹ Hunt v. Blanton, 89 Ind. 38. And see, for other illustrative cases, Hopkins v. Snedaker, 71 Ill. 449; Nealon v. Henry, 131 Mass. 153; Knight v. Houghtalling, 85 N. C. 17; Parmlee v. Adolph, 28 Ohio State, 10.

¹⁰ Clough v. London, &c. Railway, Law Rep. 7 Ex. 26.

¹¹ Beetem v. Burkholder, 19 Smith, Pa. 249; Parmlee v. Adolph, 28 Ohio State, 10.

ment of the reason; but, in other circumstances, no notice in advance of judicial proceedings is universally or even generally required.¹

§ 682. **Recover Back.** — One who thus rescinds a contract may recover back whatever he has paid or delivered under it, whether money or goods.² Again, —

§ 683. **How Ratify.** — Though a defrauded party cannot both rescind a contract and affirm it, he may, as we have seen,³ elect between the two; and, if he chooses, do the latter. Any act by which, with knowledge of the fraud, he treats the contract as subsisting, will be an affirmance precluding rescission.⁴ For example, one makes unreversible a sale of his goods if, after learning that it was brought about by the purchaser's fraud, he brings an attachment suit for the price.⁵ The defrauder cannot set up his own fraud;⁶ the contract, therefore, is perfected. As another remedy, —

§ 684. **Make Representation Good.** — When the circumstances permit, a court of equity will compel the defrauding party so to act that his representations shall be realized by the other.⁷ Thus, if partners, by pretending to a third person that a certain amount of stock, exceeding the truth, has been subscribed and paid in, entrap him into becoming a member of their association, the equity tribunal will see that they personally make good the deficiency.⁸ Or —

§ 685. **Damages at Law.** — The defrauded party may, in the action of deceit at law, or other proper form of action,

¹ *Clough v. London, &c. Railway*, Law Rep. 7 Ex. 26, 35, 36; *Schofield v. Holland*, 37 Ind. 220; *Landauer v. Cochran*, 54 Ga. 533; *Thurston v. Blanchard*, 22 Pick. 18.

² *Thurston v. Blanchard*, 22 Pick. 18; *Stevens v. Austin*, 1 Met. 557; *Mann v. Stowell*, 3 Chand. 243; *Woodworth v. Kissam*, 15 Johns. 186; *Darst v. Thomas*, 87 Ill. 222.

³ Ante, § 678, 680.

⁴ *Cobb v. Hatfield*, 46 N. Y. 533; *Jackson v. Jackson*, 47 Ga. 99; *Evans v. Foreman*, 60 Misso. 449; *Dauchy v. Silliman*, 2 Lans. 361; *Gray v. Fowler*, Law Rep. 8 Ex. 249; *Higgs v. Smith*, 3

A. K. Mar. 338; *Moffat v. Winslow*, 7 Paige, 124.

⁵ *O'Donald v. Constant*, 82 Ind. 212. For another illustration, see *Blattenberger v. Holman*, 7 Out. Pa. 555. And see *Powers v. Benedict*, 88 N. Y. 605.

⁶ *Roberts v. Lund*, 45 Vt. 82; *Jones v. Hill*, 9 Bush, 692; *Fisher v. Saylor*, 28 Smith, Pa. 84; *Watts v. Brooks*, 3 Ves. 612; *Roberts v. Roberts*, 2 B. & Ald. 367.

⁷ *Hammersley v. Baron de Biel*, 12 Cl. & F. 45.

⁸ *Moore's Case*, Law Rep. 18 Eq. 661; *Rawlins v. Wickham*, 3 De G. & J. 304.

recover of the other his damages for the fraud ;¹ and this, in some circumstances, although he has barred himself of the right to rescind.² Not every wrong within our present title can, as we have already seen,³ be redressed by this suit. Again, —

§ 686. **Relief in Equity.** — Besides the remedy in equity just mentioned,⁴ there are open to the party various other forms of equitable relief, available even though he does not choose to rescind the contract.⁵ A range through our entire equity jurisprudence, to explain them all, would not be desirable here ; but, —

§ 687. **Reform.** — In some cases, the court of equity will reform the contract, leaving it to stand as amended.⁶ Under the modern procedure, in a part of our States, this may be done in a court of law.⁷ Or, —

§ 688. **Rescind in Equity.** — The court of equity will in proper cases order the formal rescinding of the fraudulent contract.⁸ And the plaintiff need not have offered, before the bringing of the suit, to restore what he had received.⁹

§ 689. **Defence at Law.** — In a suit at law on the contract, if the parties are *in statu quo*, or if they can be so placed (and,

¹ Ward v. Wiman, 17 Wend. 193 ; Coon v. Atwell, 46 N. H. 510 ; Newell v. Horn, 45 N. H. 421 ; Hubbard v. Briggs, 31 N. Y. 518, 529 ; Ives v. Carter, 24 Conn. 392 ; Cravens v. Grant, 2 T. B. Monr. 117 ; Mullett v. Mason, Law Rep. 1 C. P. 559 ; McKee v. Eaton, 26 Kan. 226 ; Byard v. Holmes, 4 Vroom, 119.

² Parker v. Marquis, 64 Misso. 38.

³ Ante, § 662.

⁴ Ante, § 684.

⁵ Brizick v. Manners, 9 Mod. 284, 285 ; Holland v. Anderson, 38 Misso. 55 ; Pringle v. Samuel, 1 Litt. 43 ; Moore v. Clay, 7 Ala. 742 ; Miner v. Medbury, 6 Wis. 295 ; Blacks v. Catlett, 3 Litt. 139 ; Stapler v. Hurt, 16 Ala. 799 ; Long v. Fox, 100 Ill. 43.

⁶ Ellinger v. Crowl, 17 Md. 361 ; Scott v. Duncan, 1 Dev. Eq. 407 ; Rider v. Powell, 4 Abb. Ap. Dec. 63 ; Hitchins v. Pettingill, 58 N. H. 386.

⁷ Ante, § 372 ; post, § 712 ; Hall v. Guilford, 74 N. C. 130.

⁸ Boyce v. Grundy, 3 Pet. 210 ; Hough v. Richardson, 3 Story, 659 ; Fisher v. Probart, 5 Hayw. 75 ; Johnson v. Pryor, 5 Hayw. 243 ; Oswald v. McGehee, 28 Missis. 340 ; Camp v. Camp, 2 Ala. 632 ; Greenlee v. Gaines, 13 Ala. 198 ; Stark v. Henderson, 30 Ala. 438 ; Hall v. Perkins, 3 Wend. 626 ; Moreland v. Atchison, 19 Texas, 303 ; Franklin v. Greene, 2 Allen, 519 ; Wray v. Wray, 32 Ind. 126 ; Lynch's Appeal, 1 Out. Pa. 349 ; Brandon v. Forest, 9 Smith, Pa. 187 ; Matthey v. Wood, 12 Bush, 293 ; Thorn v. Thorn, 51 Mich. 167 ; Gould v. Okeden, 4 Bro. P. C. 198.

⁹ Martin v. Martin, 35 Ala. 560. And see Knowlton v. Amy, 47 Mich. 204 ; Mosely v. Miller, 13 Bush, 408 ; Kitchen v. Rayburn, 19 Wal. 254.

it would seem from some of the cases, contrary to principle and to other cases, even if they cannot), a defrauded defendant, who has not affirmed it, may in general rely on the fraud as a perfect defence.¹ Or, in some circumstances, the fraud will simply reduce the damages.² And, —

§ 690. **Concurrent Jurisdiction** — (**Law and Equity**). — In general, the courts of law and equity have concurrent jurisdiction in cases of fraud.³ Yet there are frauds which can be availed of only in equity. The authorities are not quite uniform as to where the line separating this class from the other runs.⁴

§ 691. **Fraudulent Combinations**. — In cases of combinations to defraud, a court will not entertain the suit of either conspirator against the other.⁵

§ 692. *The Doctrine of this Chapter restated.*

The expositions of this chapter relate only to voluntary contracts, not extending to those which the law creates,⁶ or to those which come by estoppel.⁷ When, therefore, parties are at liberty to make whatever agreement they choose, or to abstain from agreeing, there is no contract between them unless the will of each concurs with the other's will in their formal act of bargaining. If both wills give a consent in terms, yet the one is lured to it through the fraudulent repre-

¹ Wyman v. Heald, 17 Maine, 329; Cullum v. Branch Bank, 4 Ala. 21; Jeter v. Tucker, 1 S. C. 245; Wilson v. Cromwell, 1 Cranch C. C. 214; Ray v. Virgin, 12 Ill. 216; Winslow v. Bailey, 16 Maine, 319; Irving v. Thomas, 18 Maine, 418; Curtis v. Hall, 1 Southard, 361; Block v. Elliott, 1 Misso. 275; Pemberton v. Staples, 6 Misso. 59; Lewis v. Cosgrave, 2 Taunt. 2.

² Jackson v. Jackson, 47 Ga. 99; Brown v. North, 21 Misso. 528.

³ Smith v. McIver, 9 Wheat. 532; 1 Story Eq. Jur. § 184; Skrine v. Simons, 11 Ga. 401; Turnbull v. Gadsden, 2 Strob. Eq. 14; Anderson v. Hill, 12 Sm. & M. 679; Tomlin v. Cox, 4 Har-

rison, 76; Gilbert v. Burgott, 10 Johns. 457.

⁴ Rogers v. Colt, 1 Zab. 704; Stryker v. Vanderbilt, 1 Dutcher, 482; Wood v. Goodrich, 9 Yerg. 266 (which cases compare with ante, § 121); Higgs v. Smith, 3 A. K. Mar. 338; McKnight v. Kellett, 9 Ga. 532; Willett v. Forman, 3 J. J. Mar. 292; Hazard v. Irwin, 18 Pick. 95; Burrows v. Alter, 7 Misso. 424; Met. Con. 27; Denton v. McKenzie, 1 Des. 289; Furguson v. Coleman, 5 Heisk. 378.

⁵ Tobey v. Robinson, 99 Ill. 222; Horn v. Star Foundry, 23 W. Va. 522.

⁶ Ante, § 181 et seq.

⁷ Ante, § 264 et seq.

sentations of the other party, the intralled will, on becoming free, may accept or reject, as it pleases, what was thus imperfectly done. The defrauder has no election, for his original choice was voluntary. Hence this contract, which is good or not as one of the parties may determine, is called voidable.

The courts, in applying these principles, follow their usual course by calling to their aid such other principles of the law as concern the particular question. If, for example, two persons meet, cognizant of all relevant facts, and one of them tells the other, who believes him, that, having walked three times around the latter's cornfield blowing a fish-horn, the law gives him in compensation three-fourths of the corn; whereupon they make in due form a bargain that the former shall have of the latter the whole crop for a price estimated at one-fourth its value, such bargain is good. And this is because, of necessity, the law is administered on the basis that every man knows its provisions;¹ so that, though the owner of the corn was really defrauded, the court is not permitted thus to adjudge. The other paid him his price, with the conclusive knowledge, so the law affirms, that the blowing of the fish-horn created no obligation; hence the bargain, as legally viewed, was fair. But, if the cheat had been accomplished by a false representation of some essential fact, — as, for example, if the law really was as thus said, and the falsehood consisted in the party's statement that he had blown the fish-horn while in truth he had not, — the result would have been the other way; because, though the law presumes itself to be known to every man, it has no such presumption as to a fact. Therefore the entire law of this chapter is such, and such only, as judicial determinations have made palpable, through comparisons of the proposition that people make only the contracts they please, with the other principles of our jurisprudence.

¹ Ante, § 462.

CHAPTER XXIV.

MISTAKE IN THE CONTRACT.

§ 693, 694. Introduction.

695-706. How at Law.

707-713. Reforming and Rescinding in Equity.

714. Doctrine of Chapter restated.

§ 693. **On what Principle — Relations of Subject.** — How this subject is related to some others we saw in the last chapter. The doctrine of mistake, the same as of fraud, is in the main a product of the more elementary one that parties enter into a contract only by the concurrent consent of their wills to the same thing.¹ If the subject of the contract does not exist, or if the motive to it is a mere illusion, there is, in the one case, a grasp of the wills at vacuity, and, in the other, the wills move falsely.

§ 694. **How Chapter divided.** — We shall consider, I. The Doctrine at Law; II. Reforming and Rescinding in Equity.

I. *The Doctrine at Law.*

§ 695. **Non-existing Subject. — (Void).** — We saw, in another connection, that any stipulations which parties make concerning a thing believed to exist while it does not are simply void.² The illustrations of this proposition are numberless;³ for example, thus to take a deed of non-existing land, and give a receipt therefor as in payment of a debt, does not in law discharge the debt.⁴ So, —

¹ Ante, § 638-640.² Ante, § 587.³ Thus, *Mays v. Dwight*, 1 Norris, Pa. 462; *Indianapolis v. McAvoy*, 86Ind. 587; *Marvin v. Bennett*, 8 Paige, 312.⁴ *Anderson v. Armstead*, 69 Ill. 452. And see *Bird v. Kleiner*, 41 Wis. 134.

§ 696. **Consideration null — (Void)** — If, by reason of the mistake, there is no consideration for the contract, it, like any other similar agreement without consideration, will be void.¹ Such, for instance, is one's guaranty of another's debt, founded on the debtor's forbearance to levy an attachment for which, in fact, there is no valid ground.²

§ 697. **Executed by Mistake — (Void).** — The signing of a writing through mistake as to its contents is within principles already explained, rendering it void;³ or it is subject to be cancelled.⁴

§ 698. **In Inducement — (Voidable).** — A mistake in the inducement to a contract would seem ordinarily to make it voidable, not void, according to expositions in the last chapter. And it is specially within the doctrine of "Representation" there defined.⁵ But the particular case should be considered. Thus, —

§ 699. **Payment in Counterfeits — (As Consideration).** — The payment of a debt in counterfeit money or forged paper, believed by both parties to be genuine, does not discharge it, nor is such money or paper a consideration for any promise.⁶ Nor does a forged deed of lands pass the title as against one not participating in the forgery.⁷ But —

§ 700. **Bank paying Forgery — (Like Cases).** — A bank is under the duty to know the signatures of its own officers and customers. So that, if it pays to an honest holder the forged check of a depositor, or its own forged bill, it must suffer the loss rather than the other.⁸ And there are still other forms of negligence, in banks and other parties, in receiving forgeries, or in not returning them with due

¹ *Rovegno v. Defferari*, 40 Cal. 459.

² *Smith v. Easton*, 54 Md. 138.

³ *Ante*, § 346, 645-649.

⁴ *Schaper v. Schaper*, 84 Ill. 603; *Miller v. Gardner*, 49 Iowa, 234; *Picton v. Graham*, 2 Des. 592.

⁵ *Ante*, § 661-663; *Phillips v. Holister*, 2 Coldw. 269; *Cooper v. Phibbs*, Law Rep. 2 H. L. 149.

⁶ *Thomas v. Todd*, 6 Hill, N. Y. 340; *Jones v. Ryde*, 5 Taunt. 488; *Markle v.*

Hatfield, 2 Johns. 455; *Gurney v. Womersley*, 4 Ellis & B. 133; *Young v. Adams*, 6 Mass. 182; *Ramsdale v. Horton*, 3 Barr, 330; *Lane v. Hogan*, 5 Yerg. 290.

⁷ *Reck v. Clapp*, 2 Out. Pa. 581. And see *ante*, § 676.

⁸ *United States Bank v. Bank of Georgia*, 10 Wheat. 333; *Levy v. Bank of United States*, 1 Binn. 27; *Smith v. Mercer*, 6 Taunt. 76.

promptness, which the law will visit with the same consequence.¹

§ 701. **Mistake in one Party — (Estoppel).** — If one party only acts under a mistake, and the other is in no degree responsible for it, the contract is ordinarily valid, the former being estopped to set up the mistake as against the latter.² For example, a person offering to sell to another goods, yet accidentally misdescribing them, is bound by the description should the other, not suspecting the error, accept the offer.³ Hence, —

§ 702. **Mutual.** — Except in cases depending on special reasons, the mistake which will render a contract void or voidable must be mutual,⁴ or it may be mistake on one side and fraud on the other.⁵ If, to illustrate mutual mistake, the owner of a horse offers it to an intending purchaser for \$165, and the latter, understanding the sum to be \$65, takes it home, there is no sale, and the title is not transferred.⁶ And a compromise of a note, under a mutual misapprehension of the amount due thereon, is ineffectual.⁷ Still there are mistakes not within the reasons which created this rule, therefore not within it.⁸ Thus, —

§ 703. **Not Mutual.** — Plainly a mistake in executing a contract⁹ need not, to invalidate it, be mutual.¹⁰ And there are

¹ *Price v. Neal*, 3 Bur. 1354; *Simms v. Clark*, 11 Ill. 137; *Burrill v. Watertown Bank*, 51 Barb. 105; *Gloucester Bank v. Salem Bank*, 17 Mass. 33. See ante, § 676; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; *Cohen v. Teller*, 12 Norris, Pa. 123; *Clews v. New York Banking Assoc.* 89 N. Y. 418.

² Ante, § 317.

³ *Scott v. Littledale*, 8 Ellis & B. 815; *McFerran v. Taylor*, 3 Cranch, 270. Compare with *Joliffe v. Baker*, 11 Q. B. D. 255; *Carlisle v. Barker*, 57 Ala. 267; *Montgomery v. American Emigrant Co.* 47 Iowa, 91; *Lynch's Appeal*, 1 Ont. Pa. 349; *Isle Royale Min. Co. v. Hertin*, 37 Mich. 332. See *Paget v. Marshall*, 28 Ch. D. 255.

⁴ *Nevius v. Dunlap*, 33 N. Y. 676;

Lanier v. Wyman, 5 Rob. N. Y. 147; *Brainerd v. Arnold*, 27 Conn. 617; *Tamplin v. James*, 15 Ch. D. 215, 217; *German Am. Ins. Co. v. Davis*, 131 Mass. 316; *Schautz v. Keener*, 87 Ind. 258; *Allen v. Hammond*, 11 Pet. 63, 71; *Renshaw v. Lefferman*, 51 Md. 277.

⁵ *Wyche v. Greene*, 26 Ga. 415; *Worley v. Moore*, 77 Ind. 567; *Cocking v. Pratt*, 1 Ves. sen. 400; *Bergen v. Ebey*, 88 Ill. 269.

⁶ *Rupley v. Daggett*, 74 Ill. 351.

⁷ *Easton v. Strother*, 57 Iowa, 506.

⁸ *Pitcher v. Hennessey*, 48 N. Y. 415, 423.

⁹ Ante, § 697

¹⁰ *Pitcher v. Hennessey*, 48 N. Y. 415, 424; *Foster v. Mackinnon*, Law Rep. 4 C. P. 704, 711.

other cases within this sort of exception. But the reason for the rule of mutuality having now been made to appear, the reader will have no difficulty in distinguishing the exceptions as they arise.¹

§ 704. **Mistaking Law — Fact.** — As stated in a preceding chapter,² a misapprehension of the law is, in legal contemplation, impossible; because of a conclusive presumption that the party knows it. Therefore what in common speech is termed a mistake of it does not impair a contract in a court of law, or furnish ground for its rectification in equity.³ Any mistake, to be available, must be of fact.⁴ Such is the strict, hard doctrine. But, in practice, it is often so construed as to be considerably mollified, yet mollified to what extent no one can say; for the decisions are in discord, past reconciliation. Thus, —

§ 705. **Construction of Contract.** — Within this distinction, is the relation of parties, created by a contract, one of fact or of law?⁵ In reason, it should be held to be of fact, since justice is by such construction best promoted. And there are many adjudications which go so far as to affirm that, if the terms which parties employ fail to carry out their purpose because of their misapprehending the law, the contract will be accordingly reformed in equity, — a sort of mistake which is sometimes, it is submitted not correctly, spoken of as of law.⁶

¹ Consult *Edinburg Am. &c. Co. v. Latham*, 88 Ind. 88; *Cocking v. Pratt*, 1 Ves. sen. 400; *Rockville Bank v. Lafayette Bank*, 69 Ind. 479; *Paget v. Marshall*, 28 Ch. D. 255.

² Ante, § 462-465.

³ *Goltra v. Sanasack*, 53 Ill. 456; *Weed v. Weed*, 94 N. Y. 243; *Snell v. Insurance Co.* 98 U. S. 85; *Glenn v. Statler*, 42 Iowa, 107; *Toops v. Snyder*, 70 Ind. 554; *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143; *Bank of United States v. Daniel*, 12 Pet. 32.

⁴ *Midland, &c. Railway v. Johnson*, 6 H. L. Cas. 798, 4 Jur. n. s. 643; *Marshall v. Collett*, 1 Y. & Col. Ex. 232, 238; *Kelly v. Solari*, 9 M. & W. 54.

⁵ Ante, § 465.

⁶ *Canedy v. Marcy*, 13 Gray, 373, 377; *Stover v. Poole*, 67 Maine, 217, 223; *Sparks v. Pittman*, 51 Missis. 511; *Jones v. Munroe*, 32 Ga. 181; *Evants v. Strode*, 11 Ohio, 480; *Broadwell v. Broadwell*, 1 Gilman, 599. See *Clark v. Girdwood*, 7 Ch. D. 9. In many of the cases it is said that a mistake of law will, in exceptional circumstances, be permitted to avoid a contract; as, where it evidences fraud, imposition, or improper influence. For example, *Stover v. Poole*, 67 Maine, 217. But it seems to me that, in all this class of cases, either the mistake was incorrectly termed one of law, or the real ground of relief was the fraud, the undue influence, or

There are other decisions which, while not accepting this doctrine for the ordinary cases, enforce it when the mistake is the product of the fault or misrepresentation of the opposite party, especially if such party stands in a relation of confidence to the other, and even if he does not.¹ On the other hand, there is a great deal of authority to the proposition that, where the words were meant by the parties, there can be no relief though they mistook their legal effect.² Plainly this latter rule would be applied, by every court, to any case where there was no pre-existing contract, which the final one was attempting to carry into effect.³

§ 706. **Other Like Distinctions**, — and nice questions, involving more or less of discordant adjudication, appear in the books; but it is not deemed necessary to look into the subject further here.⁴ Instructive similitudes may be found in the expositions of the last chapter.

II. *Reforming and Rescinding in Equity.*

§ 707. **Writing not truly expressing Agreement.** — Where parties, having entered into an oral agreement, undertake simply to reduce it to writing, if, by some mistake of the draughtsman, or their own misapprehension as to the effect of the words employed,⁵ or otherwise, it is found after execution

the other thing, whatever it may have been. That a mistake of law mingles with another matter of complaint, or that the other matter proceeded from such mistake, or was caused by it, is in no case prejudicial.

¹ *Drew v. Clarke*, Cooke, Tenn. 373; *Meckley's Estate*, 8 Harris, Pa. 478; *Zane v. Cawley*, 6 C. E. Green, 130; *Sparks v. White*, 7 Humph. 86; *Jenkins v. German Luth. Cong.* 58 Ga. 125; *Beall v. McGehee*, 57 Ala. 438. In a late English case, Lush, J., observed: "I do not think that we need determine the question which has mainly been argued, whether a fraudulent representation as to the effect of a deed can be relied upon as a defence to an action

upon the deed, but I should not have the least hesitation in holding that it does constitute a defence; and I think that we have been referred to no authority which should induce us to decide otherwise." *Hirschfeld v. London, &c. Railway*, 2 Q. B. D. 1, 5, 6.

² *Gerald v. Elley*, 45 Iowa, 322; *Ottenheimer v. Cook*, 10 Heisk. 309; *Beall v. McGehee*, supra; *Miller v. Chipewa*, 58 Wis. 630; *Bell v. Lawrence*, 51 Ala. 160; *Spencer v. Millisack*, 52 Iowa, 31.

³ *Hunt v. Rhodes*, 1 Pet. 1, 13; *Clark v. Hart*, 57 Ala. 390. And see *Robertson v. Walker*, 51 Ala. 484.

⁴ And see ante, § 465.

⁵ Ante, § 705.

not to contain or mean what both meant, yet still one insists on standing upon its terms, a court of equity will on prayer of the other reform it to express their real agreement, or in proper circumstances declare it void. The mistake must, in general, be mutual;¹ and it must be clearly established by the proofs, which may be either oral or written.² Indeed, —

§ 708. **Weight of Proofs.** — In no case will a court decree an alteration in the terms of a duly executed written contract, unless the proofs are full, clear, and decisive.³ Mere preponderance of evidence is not enough, the mistake must appear beyond reasonable controversy.⁴

§ 709. **Conveyance of Land.** — Our subject finds a frequent illustration in deeds of real estate. If, after a sale or lease and possession taken, the deed is found to describe the wrong parcel, or too much or too little of the right one, or to describe the right one defectively, the party aggrieved may have it reformed, on due proofs, which in such a case are commonly easy.⁵ And, where the proofs are sufficiently plain, possession is not an essential element.⁶ The like rule applies also to any

¹ Ante, § 701–703.

² *Druiff v. Parker*, Law Rep. 5 Eq. 131, 139; *In re De la Touche*, Law Rep. 10 Eq. 599; *White v. White*, Law Rep. 15 Eq. 247; *Huss v. Morris*, 13 Smith, Pa. 367; *Shay v. Pettes*, 35 Ill. 360; *Lyman v. United Insurance Co.* 17 Johns. 373; *Clayton v. Bussey*, 30 Ga. 946; *Rogers v. Atkinson*, 1 Kelly, 12; *Greer v. Caldwell*, 14 Ga. 207; *Scales v. Ashbrook*, 1 Met. Ky. 358; *Harrison v. Jameson*, 3 J. J. Mar. 232; *Rigsbee v. Trees*, 21 Ind. 227; *Lanier v. Wyman*, 5 Rob. N. Y. 147; *Evants v. Strode*, 11 Ohio, 480; *Hull v. Cunningham*, 1 Munf. 330; *Argenbright v. Campbell*, 3 Hen. & M. 144; *Waterman v. Dutton*, 6 Wis. 265; *Nevius v. Dunlap*, 33 N. Y. 676; *Proctor v. Thrall*, 22 Vt. 262; *Montville v. Haughton*, 7 Conn. 543; *Garner v. Garner*, 1 Des. 437; *Lanning v. Carpenter*, 48 N. Y. 408; *Schwear v. Haupt*, 49 Misso. 225; *Mead v. Westchester Fire Ins. Co.* 64 N. Y. 453; *Briegel v. Moeller*, 82 Ill. 257;

Stephens v. Murton, 6 Oregon, 193; *Mastelar v. Edgerton*, 44 Iowa, 495; *Popplein v. Foley*, 61 Md. 381; *Kelley v. McKinney*, 5 Lea, 164; *Cotton States Life Ins. Co. v. Carter*, 65 Ga. 228.

³ *German Am. Ins. Co v. Davis*, 131 Mass. 316; *Wry v. Cutler*, 12 Heisk. 28; *Stover v. Poole*, 67 Maine, 217; *Alexander v. Caldwell*, 55 Ala. 517; *Campbell v. Hatchett*, 55 Ala. 548; *Vreeland v. Bramhall*, 1 Stew. Ch. 85; *Flaacke v. Jersey City*, 1 Stew. Ch. 110; *Cummins v. Bulgin*, 10 Stew. Ch. 476.

⁴ *Potter v. Potter*, 27 Ohio State, 84, 85; *Hinton v. Citizens Mut. Ins. Co.* 63 Ala. 488.

⁵ *Broadwell v. Phillips*, 30 Ohio State, 255; *Murray v. Dake*, 46 Cal. 644; *Jones v. Sharp*, 9 Heisk. 660; *Elliott v. Horton*, 28 Grat. 766; *Harold v. Weaver*, 72 Ala. 373.

⁶ *Ramsey v. Loomis*, 6 Oregon, 367; *Kostenbader v. Peters*, 30 Smith, Pa. 438; *Preston v. Williams*, 81 Ill. 176; *Carver v. Lassalette*, 57 Wis. 232;

other error in the deed; thus, if the scrivener writes "successors," meaning "heirs,"¹ or otherwise omits or mistakes the words of inheritance,² equity will reform it. Or if it is found defective in any formality essential to its taking effect,³ or to contain a clause stipulating what the parties did not intend,⁴ reformation will be granted. But, —

§ 710. **Third Persons.** — In these and other like cases, the rights of third persons, acquired in good faith and for value, will be protected; so that, as against them, there can be no reformation.⁵ But a third person who knew of the mistake when he obtained the interest cannot object to the correction.⁶

§ 711. **Nature of Mistake — (Form of Remedy).** — The mistake must be material;⁷ and such that, but for it, the complaining party would not have assumed the obligation.⁸ Then the remedy will be adjusted to the equities of the particular case.⁹

§ 712. **Procedure.** — The reformation is properly on an application to the equity tribunal for the express purpose; but if, in any suit in equity, a contract is set up, the court may reform it.¹⁰ And where, as in some of our States, equitable claims and defences are maintainable in proceedings at law, the court of law may in like manner reform the contract collaterally.¹¹ But, —

Cake v. Peet, 49 Conn. 501; *Robbins v. Magee*, 76 Ind. 381; *Parish v. Scott*, 10 Heisk. 438; *Dane v. Derber*, 28 Wis. 216.

¹ *McMillan v. Fish*, 2 Stew. Ch. 610.

² *Nicholson v. Caress*, 59 Ind. 39; *Randolph v. New Jersey W. L. Railroad*, 1 Stew. Ch. 49; *Wanner v. Sisson*, 2 Stew. Ch. 141.

³ *Berry v. Sowell*, 72 Ala. 14; *Gerdes v. Moody*, 41 Cal. 335. See ante, § 394.

⁴ *Bull v. Titsworth*, 2 Stew. Ch. 73; *Culver v. Badger*, 2 Stew. Ch. 74; *Elliott v. Sackett*, 108 U. S. 132.

⁵ *Henry v. Smith*, 76 N. C. 311; *Foster v. Kingsley*, 67 Maine, 152.

⁶ *Preston v. Williams*, 81 Ill. 176;

Foster v. Kingsley, supra. See *Carver v. Lassalette*, 57 Wis. 232.

⁷ Ante, § 652.

⁸ *Grymes v. Sanders*, 93 U. S. 55.

⁹ *Boone v. Ridgway*, 2 Stew. Ch. 543; *McMullen v. Lockwood*, 4 Del. Ch. 568; *Groves v. Perkins*, 6 Sim. 576; *Keating v. Price*, 58 Md. 532; *Story v. Conger*, 36 N. Y. 673; *Paine v. Upton*, 87 N. Y. 327; *Cassidy v. Metcalf*, 66 Misso. 519; *Snyder v. Ives*, 42 Iowa, 157; *Oldham v. Wilmington Bank*, 85 N. C. 240.

¹⁰ *Shelby v. Smith*, 2 A. K. Mar. 504; *Smith v. Allen*, Saxton, 43.

¹¹ Ante, § 372, 687; *Hall v. Guilford*, 74 N. C. 130; *Pitcher v. Hennessey*, 48 N. Y. 415; *Van Dusen v. Parley*, 40 Iowa, 70.

§ 713. **At Law.** — In a court of law, under the common-law rules, though it is always a question whether or not a particular contract in writing has been so executed as to bind the parties;¹ yet, if it has, not what they intended, as explained by parol, but its terms, as interpreted by the court, will prevail; nor can the writing be reformed, though in some circumstances it may be shown to be void for fraud, duress, or mistake.² There are, therefore, contracts, not so imperfect through mistake as to be adjudged void in a court of law, reformable in equity, while others which would be so reformed, or pronounced void, are void also at law.

§ 714. *The Doctrine of this Chapter restated.*

Theoretically, any mistake, even of one of the parties, so material that, but for it, the contract would not be made, renders it a nullity; because the consent of both parties, to the same thing, given at the same instant of time, is essential to its constitution. But, in practical affairs, this requirement of mutual consent to a contract is only one of many doctrines which regulate the intercourse of men; and, when other doctrines combine with this one, the result may be quite different. For example, the doctrine of estoppel may preclude a party from setting up the mistake, and so may the doctrine which protects an innocent third person who has acquired rights under a form of contract put forth by a party as valid. In ways like these the abstract doctrine of mistake has become greatly limited. Not only should the practitioner be on the alert to note the limitations already spoken of in this chapter; but, in cases of difficulty, he should search for others, which may be found interspersed among the other doctrines of the entire law.

¹ Ante, § 340-361, 646-649, 697; 1 425; *Sanford v. Howard*, 29 Ala. 684; *Greenl. Ev.* § 284. *Griswold v. Scott*, 13 Ga. 210; *Fitts v.*

² *Shankland v. Washington*, 5 Pet. Brown, 20 N. H. 393; *Cato v. Thompson*, 9 Q. B. D. 616.

CHAPTER XXV.

CONTRACTS MADE UNDER DURESS.

§ 715. **Defined.** — Duress is any unlawful, physical force, applied or threatened to the person of the party, or of the party's husband, wife, parent, or child, through constraint of which he, in form, consents to what he otherwise would not. This definition is believed to be accurate as tested by the better authorities, but at some points it departs slightly from various utterances in the books.

§ 716. **Actual or Threatened.** — It is immaterial whether the duress is actual or only, in a serious and effectual manner, threatened.¹ This idea is expressed in the older books by dividing it, in the words of Blackstone, into "two sorts, duress of imprisonment, where a man actually loses his liberty, and duress *per minas*, where the hardship is only threatened and impending."²

§ 717. **Imprisonment.** — A familiar form of duress is actual or threatened imprisonment; always, where unlawful, sufficient.³ An unlawful imprisonment, otherwise called false imprisonment, is any restraint of one's liberty in any place, whether used for imprisonment generally or only on the particular occasion, and whether by bolts and bars or by words and an array of force.⁴ Also, —

§ 718. **Other Bodily Harm.** — Besides imprisonment, all the authorities hold a menace of life or limb, or of a mayhem, to

¹ Baker v. Morton, 12 Wal. 150; Hill, N. Y. 154; Whitefield v. Longfellow, 13 Maine, 146; Bowker v. Lowell, 49 Maine, 429.

² 1 Bl. Com. 130, 131; Mundy v. Whittemore, 15 Neb. 647, 651.

⁴ 2 Bishop Crim. Law, § 748.

³ 2 Inst. 482; Foshay v. Ferguson, 5

be duress.¹ Nor do the older ones admit that any other form of threatened or actual violence to the person, or any mere battery, is such; because, it was deemed, the law's redress is, for these latter wrongs, adequate, yet not for the former, and the injured party should not permit fear to overcome his will when he is fully protected by the law.² But, in reason, a disgraceful public beating, or a tarring and feathering, is, at least, as much to be dreaded, and as inadequately compensated by a lawsuit, as a slight restraint of locomotion; and the better modern opinion is, that any serious bodily harm, actual or threatened, is duress.³

§ 719. *Fear — Mind acted on.* — Only when the duress, through exciting the fear of the party, becomes the cause of his executing the contract, will its validity be impaired.⁴ Coke adds: "It must not be a vain fear, but such as may befall a constant man; as, if the adverse party lie in wait in the way with weapons, or by words menace to beat, maim, or kill him."⁵ The illustration, in the second clause of this extract, of the proposition in the first, shows that this great lawyer failed to distinguish between the mind acted upon and the thing menaced. And herein we have, perhaps, the origin of a proposition found in many of the cases, yet certainly incorrect; namely, that the threat must be such as would excite the reasonable apprehensions of a person of ordinary courage.⁶ The doctrines of our next chapter teach us that, in exact accord with fundamental reason, the law of contracts considers the quality of the contracting mind;⁷ and, therefore, holds the apparent yet unreal consent of a subject or timid person, or person of inferior intellect, as

¹ *Bogle v. Hammons*, 2 Heisk. 136; *Baker v. Morton*, 12 Wal. 150.

² 2 Inst. 483; 1 Bl. Com. 131.

³ *Foshay v. Ferguson*, 5 Hill, N. Y. 154; *Collins v. Westbury*, 2 Bay, 211; *Adams v. Stringer*, 78 Ind. 175; *Baker v. Morton*, 12 Wal. 150; *Burr v. Burton*, 18 Ark. 214; *Bosley v. Shanner*, 26 Ark. 280; *Miller v. Miller*, 18 Smith, Pa. 486.

⁴ *Robinson v. Gould*, 11 Cush, 55, 58;

Hamilton v. Smith, 57 Iowa, 15; *Adams v. Stringer*, 78 Ind. 175; *Feller v. Green*, 26 Mich. 70; *Knapp v. Hyde*, 60 Barb. 80.

⁵ Co. Lit. 253 b.

⁶ *Bosley v. Shanner*, 26 Ark. 280; *Miller v. Miller*, 18 Smith, Pa. 486; *Bane v. Detrick*, 52 Ill. 19; *Barrett v. French*, 1 Conn. 354.

⁷ Post, § 733.

invalid as that of the strongest and most independent understanding, though the latter would not have been intralled where the former was.¹

§ 720. **Judicial Process**, — whether civil or criminal, is not duress. Therefore one arrested or imprisoned under it, or threatened therewith, when lawful in form, fairly conducted, and without malice, may, to free himself therefrom, or for any other purpose, enter into any agreement which would otherwise be permissible, precisely the same as in ordinary circumstances.² Still the contract of a man imprisoned, though lawfully, will on that account be more carefully scrutinized by the court.³ But —

§ 721. **Process Unlawful or Abused**. — A void judicial process is the same as none; therefore a contract procured by an arrest or imprisonment under it is invalid.⁴ And, beyond this, any abuse of process, however correct in form, — as, for example, where it is malicious and without probable cause, or where a lawful imprisonment is carried to an unlawful degree, or, it appears, any other abuse of a sort which the law recognizes, — will be deemed duress, vitiating a contract entered into under its influence.⁵ All proceedings taken for unlawful purposes, however lawful otherwise, are within this

¹ And see observations of Caldwell, J., in *James v. Roberts*, 18 Ohio, 548, 562.

² Ante, § 494; *Waterman v. Barratt*, 4 Harring. Del. 311; *Bates v. Butler*, 46 Maine, 387; *Holmes v. Hill*, 19 Misso. 159; *Kelley v. Noyes*, 43 N. H. 209; *Eddy v. Herrin*, 17 Maine, 338; *Wilcox v. Howland*, 23 Pick. 167; *Taylor v. Cottrell*, 16 Ill. 93; *Soule v. Bonney*, 37 Maine, 128; *Stebbins v. Niles*, 25 Missis. 267; *Nealley v. Greenough*, 5 Fost. N. H. 325; *Knapp v. Hyde*, 60 Barb. 80; *Kelsey v. Hobby*, 16 Pet. 269; *Smith v. Atwood*, 14 Ga. 402; *Felton v. Gregory*, 130 Mass. 176; *Smillie v. Titus*, 5 Stew. Ch. 51; *Bodine v. Morgan*, 10 Stew. Ch. 426; *Peckham v. Hendren*, 76 Ind. 47; *Plant v. Gunn*, 2 Woods, 372; *Landa v. Obert*, 45

Texas, 539; *Prichard v. Sharp*, 51 Mich. 432.

³ *Brinkley v. Hann*, Drury, 175. See *Hutson v. Hutson*, 7 T. R. 7; *Evans v. Begleys*, 2 Wend. 243.

⁴ *Alexander v. Pierce*, 10 N. H. 494; *Fisher v. Shattuck*, 17 Pick. 252; *Guilleaume v. Rowe*, 94 N. Y. 268; *Davis v. Luster*, 64 Misso. 43.

⁵ *Osborn v. Robbins*, 36 N. Y. 365; *Shaw v. Spooner*, 9 N. H. 197; *Meadows v. Smith*, 7 Ire. Eq. 7; *Breck v. Blanchard*, 2 Fost. N. H. 303; *Stouffer v. Latshaw*, 2 Watts, 165, 167; *Whitefield v. Longfellow*, 13 Maine, 146; *Fay v. Oatley*, 6 Wis. 42; *Cumming v. Ince*, 11 Q. B. 112; *Phelps v. Zuschlag*, 34 Texas, 371; *Thurman v. Burt*, 53 Ill. 129; *Kelsey v. Hobby*, 16 Pet. 269; *Hullhorst v. Scharner*, 15 Neb. 57.

rule.¹ Such, for instance, is a criminal prosecution to procure civil redress.²

§ 722. **Duress of Goods.**—It is settled in England, that no taking or detention of one's goods will constitute the duress which avoids a contract.³ And in a general way, or to an extent not quite definable, or varying with the States, the same rule prevails with us.⁴ Plainly, therefore,—

§ 723. **Law Suit — (Breach of Contract).**—The threat of levying an execution, or of bringing a suit at law affecting goods,⁵ even though the party is in need, and the opposing party is the government,⁶ will not constitute duress. Nor will the threat to withhold payment of a debt,⁷ or to violate any other contract.⁸ Still,—

§ 724. **Exceptions as to Duress of Goods.**—In a part or all of our States, duress of goods, including a threat to destroy them, is, in circumstances of extreme oppression, not further definable or not uniform, put on a like ground with duress of the person, avoiding the contract.⁹ And,—

§ 725. **Recovering back Money.**—Both in England and with us, the unlawful detention of personal property, or the threat to take it unlawfully, even though under the forms of law, is, while it may not have the effect of duress, or be regarded as such, deemed so far a compulsion that money paid to retain or regain the possession may be recovered back as not parted with voluntarily.¹⁰ The reasoning appears to be,

¹ *Phelps v. Zuschlag*, supra; *Richardson v. Duncan*, 3 N. H. 508; *Foshay v. Ferguson*, 5 Hill, N. Y. 154, 157; *Severance v. Kimball*, 8 N. H. 386.

² *Seiber v. Price*, 26 Mich. 518.

³ 2 Inst. 483; *Summer v. Ferryman*, cited 2 Stra. 917; *Skeate v. Beale*, 11 A. & E. 983, 990; *Atlee v. Backhouse*, 3 M. & W. 633, 650; *Oates v. Hudson*, 6 Exch. 346, 348.

⁴ *Lehman v. Shackelford*, 50 Ala. 437; *Bingham v. Sessions*, 6 Sm. & M. 13; *Hazelrigg v. Donaldson*, 2 Met. Ky. 445.

⁵ *Mayhew v. Phoenix Ins. Co.* 23 Mich. 105; *Miller v. Miller*, 18 Smith, Pa. 486; *Wells v. Barnett*, 7 Texas,

584; *Wilcox v. Howland*, 23 Pick. 167.

⁶ *United States v. Child*, 12 Wal. 232, 243.

⁷ *Miller v. Miller*, 18 Smith, Pa. 486; *Hackley v. Headley*, 45 Mich. 569.

⁸ *McCarty v. Hampton Build. Assoc.* 61 Iowa, 287.

⁹ *Spaids v. Barrett*, 57 Ill. 289; *Collins v. Westbury*, 2 Bay, 211; *Sasportas v. Jennings*, 1 Bay, 470; *Foshay v. Ferguson*, 5 Hill, N. Y. 154; *Hibbard v. Mills*, 46 Vt. 243. See *Williams v. Phelps*, 16 Wis. 80.

¹⁰ *Atlee v. Backhouse*, 3 M. & W. 633, 650; *Duke de Cadaval v. Collins*, 4 A. & E. 858; *Ashmole v. Wainwright*,

that, in duress, the party was compelled to the contract because he could not have adequate redress at law for the unlawful force;¹ but, in the cases thus justifying the recovery of the money, "we must take it," to follow the judicial language in one case, "he paid the money relying on his legal remedy to get it back."² Parke, B. stated the distinction to be, that, "if my goods have been wrongfully detained, and I pay money simply to obtain them again, that, being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money and to receive them back, that cannot be avoided on the ground of duress."³ On the other hand, as to the latter point, we have American authority for the proposition that, since money paid in these circumstances can be recovered back, an agreement to pay it is null.⁴ Of course, money given to get control again of goods lawfully attached on a just demand cannot be reclaimed,⁵ nor can any payment which was compelled by a valid judicial judgment against the party paying.⁶ Again, —

§ 726. **In Equity** — contracts are set aside for force exciting apprehensions short of the duress of the common law.⁷ For, says Story, "the constant rule in equity is that, where a party is not a free agent and is not equal to protecting himself, the court will protect him."⁸

2 Q. B. 837, 6 Jur. 729; *Mariposa Co. v. Bowman*, Deady, 228; *Hendy v. Soule*, Deady, 400; *Sartwell v. Horton*, 28 Vt. 370; *Ogden v. Maxwell*, 3 Blatch. 319; *People v. Vischer*, 9 Cal. 365; *Maxwell v. Griswold*, 10 How. U. S. 242; *Harmony v. Bingham*, 2 Kernan, 99; *Beckwith v. Frisbie*, 32 Vt. 559; *Harvey v. Olney*, 42 Ill. 336; *Laterrade v. Kaiser*, 15 La. An. 296; *Dakota v. Parker*, 7 Minn. 267; *Chase v. Dwinal*, 7 Greenl. 134; *Quinnett v. Washington*, 10 Misso. 53.

¹ Ante, § 718; *Skeate v. Beale*, 11 A. & E. 983, 990; *Miller v. Miller*, 18 Smith, Pa. 486.

² *Astley v. Reynolds*, 2 Stra. 915, 916.

³ *Atlee v. Backhouse*, supra.

⁴ *Bennett v. Ford*, 47 Ind. 264; *Crawford v. Cato*, 22 Ga. 594.

⁵ *Kohler v. Wells*, 26 Cal. 606. And see *McMillan v. Vischer*, 14 Cal. 232; *Dickerman v. Lord*, 21 Iowa, 338.

⁶ *De Medina v. Grove*, 10 Q. B. 152. Compare with *Coady v. Curry*, 8 Daly, 58.

⁷ 1 Story Eq. § 239; *Davis v. Luster*, 64 Misso. 43; *Brown v. Peck*, 2 Wis. 261; *Central Bank v. Copeland*, 18 Md. 305. See *Davis v. Fox*, 59 Misso. 125.

⁸ 1 Story Eq. § 239. See post, § 732.

§ 727. **To Party** — (**Husband** — **Wife** — **Parent** — **Child**). — In general, only duress to the party, not to a third person, will avoid the contract.¹ But husband and wife are so far one that the duress of either will render invalid the other's undertaking made to procure disenthralment.² And within the same rule is the relation of parent and child;³ but probably no other relationship is, though the question does not appear to be conclusively settled.

§ 728. **Voidable** — (**Innocent Third Persons**). — In general, the party exercising the duress is bound, and the other has his election whether to abide by the contract or repudiate it;⁴ therefore it belongs to the class⁵ termed voidable, and not void.⁶ For example, negotiable paper, obtained by duress, is good in the hands of a third person who received it before maturity, in good faith, for value.⁷ But one who took it with notice of the duress cannot enforce payment.⁸ On the other hand, —

§ 729. **Void**. — There are circumstances in which the duress makes the contract void. Thus, if, recurring to distinctions stated under the title "Fraud,"⁹ the party does not render even an imperfect consent to the bargain itself, but simply signs the writing or pronounces the oral words under the pressure of duress, the entire lack of any yielding of his will evidently leaves the formal contracting simply null. And there

¹ *Robinson v. Gould*, 11 Cush. 55, 57; *McClintick v. Cummins*, 3 McLean, 158; *Spaulding v. Crawford*, 27 Texas, 155; *Schee v. McQuilken*, 59 Ind. 269; *Bowman v. Hiller*, 130 Mass. 153.

² *Singer Manuf. Co. v. Rawson*, 50 Iowa, 634; *Nevada Bank v. Bryan*, 62 Iowa, 42; *Harris v. Carmody*, 131 Mass. 51, and authorities there cited. See *Mundy v. Whittemore*, 15 Neb. 647; *Wright v. Remington*, 12 Vroom, 48; *Remington v. Wright*, 14 Vroom, 451.

³ *Harris v. Carmody*, supra; *Shenk v. Phelps*, 6 Bradw. 612; *McClintick v. Cummins*, 3 McLean, 158; *Osborn v. Robbins*, 36 N. Y. 365, 372. See *Metropolitan Life Ins. Co. v. Meeker*, 85 N. Y. 614; *Seymour v. Prescott*, 69

Maine, 376; *Coffman v. Lookout Bank*, 5 Lea, 232; *Williams v. Bayley*, Law Rep. 1 H. L. 200.

⁴ Ante, § 678; *Ormes v. Beadel*, 2 De G. F. & J. 333.

⁵ Ante, § 611, 617.

⁶ 2 Inst. 482, 483; *Huscombe v. Standing*, Cro. Jac. 187; *Whelpdale's Case*, 5 Co. 119 a; *Veach v. Thompson*, 15 Iowa, 380; *Clark v. Pease*, 41 N. H. 414. See *Loomis v. Ruck*, 56 N. Y. 462.

⁷ *Veach v. Thompson*, 15 Iowa, 380; *Clark v. Pease*, 41 N. H. 414; *Rogers v. Adams*, 66 Ala. 600.

⁸ *Osborn v. Robbins*, 36 N. Y. 365, 371.

⁹ Ante, § 645-649, 671.

are other exceptional cases, not quite within this distinction, in which also the contract will be void rather than voidable.¹

§ 730. *The Doctrine of this Chapter restated.*

The principles laid down in the chapters on "Fraud" and "Mistake" apply also to duress. Each of these three impediments intralls the will; so that either it gives no consent in fact, in which case the contract is void, or a vitiated consent, rendering it voidable. In duress, there are some propositions of law, or, at least, propositions accepted in the common-law courts, which seem a little technical. In reason, any unlawful exercise of physical force, the effect whereof is to induce a person to become a party to an apparent contract, should be deemed duress. And the test of it should be simply and only, whether or not, in the particular instance, it produced this effect. Not quite so, we have seen, is the language of the books; yet the authorities are not so conclusive against this view as to render hopeless the urging of it upon an intelligent court, in a proper case. No form of lawful force is duress, since one could not ask relief from the legitimate effects of a lawful compulsion.

¹ Nevada Bank v. Bryan, 62 Iowa, Singer Manuf. Co. v. Rawson, 50 Iowa, 42; Loomis v. Ruck, 56 N. Y. 462; 634.

CHAPTER XXVI.

CONTRACTS UNDER CONSTRAINING COMBINATIONS AND
OTHER CONSTRAINTS THAN THE FOREGOING.

§ 731. **Relations of Subject.** — This chapter is related to the last three as already pointed out.¹

§ 732. **Equity.** — The books often explain that, in our dual system of law and equity, the equity and common-law courts have concurrent jurisdiction of frauds; yet that equity has more effective forms to redress them than law, and, to a slight degree, or in some particulars, rules further reaching.² It is equally so, also, with mistake and duress.³ The constraints of this chapter come oftener for redress before the equity tribunals, and less frequently before those of common law, than unmingled fraud, mistake, or duress, to all of which they are related. The partition lines between the jurisdictions of law and equity are not drawn in all our States at precisely the same places,⁴ and through legislation they are becoming gradually effaced altogether;⁵ therefore it is not deemed best that much of our space be here occupied in explanations respecting them.

§ 733. **Mingling of Impediments to Consent.** — The law — not now considering in what tribunals, whether of equity or common law, administered — will not suffer that to be imposed upon a party as his contract which did not in fact receive the assent of his uninthrall'd will, except in special

¹ Ante, § 638-640.

² 1 Story Eq. 59-62; 1 Chit. Gen. Pract. 779, 786; Smith v. McIver, 9 Wheat. 532; Wyche v. Greene, 11 Ga. 159; English v. Benedict, 25 Missis. 167.

³ Story Eq. ut sup.; Central Bank v. Copeland, 18 Md. 305; ante, § 707-713, 726; Crawford v. Cato, 22 Ga. 594.

⁴ See, for illustration, ante, § 281.

⁵ Ante, § 372, 478, note, 687, 712.

circumstances of estoppel and the like, not necessary to be here pointed out.¹ In practical affairs, men are often subjected to numbers of adverse influences concurring; and, when two or more things combine to prevent a real consent to what is outwardly a contract, while yet no one of the things alone would have wrought the result, it is the same as though one such thing, augmented by enough of its kind, and operating without the others, had done it.² Thus, —

§ 734. **Drunkenness and Fraud.** — Drunkenness in the one party and fraud in the other may so combine as to vitiate the contract, when neither was sufficient in degree to produce alone the result.³ So —

§ 735. **Mental Weakness or Illiteracy and Fraud.** — Weakness of intellect or illiteracy, less intense than the law requires to avoid a contract, may, in conjunction with less of fraud, produce this consequence.⁴ Again, —

§ 736. **Smallness of Consideration Combining.** — Too small a consideration, yet not in itself impairing the contract, may combine with fraud, undue influence, mental weakness, immature years, or drunkenness, or all these may unite, and together produce a nullity which no one alone could do.⁵

§ 737. **Unconscionable.** — A contract may be so unjust⁶ or unconscionable that, though made between competent parties and without actual fraud, no court will give it effect. The relief is oftener asked of the equity tribunals, but those of common law sometimes treat it as void.⁷ Commonly, as ex-

¹ Ante, § 30, 313; *Mead v. Bunn*, 32 N. Y. 275, 276–278; *Central Bank v. Copeland*, 18 Md. 305; *Lenhard v. Lenhard*, 59 Wis. 60.

² *Whelan v. Whelan*, 3 Cow. 537; *Coffman v. Lookout Bank*, 5 Lea, 232; *Marshall v. Billingsly*, 7 Ind. 250; *Williams v. Bayley*, Law Rep. 1 H. L. 200.

³ *White v. Cox*, 3 Hayw. 79, 83; *O'Conner v. Rempt*, 2 Stew. Ch. 156; *Burroughs v. Richman*, 1 Green, N. J. 233; *Birdsong v. Birdsong*, 2 Head, 289; *Mansfield v. Watson*, 2 Iowa, 111.

⁴ *Allore v. Jewell*, 94 U. S. 506; *Owings's Case*, 1 Bland, 370, 377; *Sel-*

den v. Myers, 20 How. U. S. 506; *Somes v. Skinner*, 16 Mass. 348, 358; *Neely v. Anderson*, 2 Strob. Eq. 262; *Bunch v. Hurst*, 3 Des. 273; *Moore v. Moore*, 56 Cal. 89; *Connelly v. Fisher*, 3 Tenn. Ch. 382; *Craddock v. Cabiness*, 1 Swan, Tenn. 474.

⁵ Ante, § 45; *Parkhurst v. Hosford*, 21 Fed. Rep. 827; *Holland v. Barnes*, 53 Ala. 83; *Howe Machine Co. v. Rosine*, 87 Ill. 105; *Brown v. Pring*, 1 Ves. sen. 407; *McClure v. Lewis*, 4 Misso. Ap. 554.

⁶ Ante, § 478.

⁷ 1 Story Eq. § 331, and note;

plained in the last section, a contract will not be pronounced ill on the sole ground that the advantages of the bargain were greatly in favor of one of the parties, but some other element should ordinarily be added.¹ Thus, —

§ 738. **Advantage of Situation.** — Where the assignee of an insurance policy could obtain the money only by aid of the assignor's signature, and as compensation for it the latter exacted of the former a promise to pay him a quarter of what should be received, the court instead, permitted him to recover only what the service of making the signature was fairly worth.² Again, —

§ 739. **Persons in Expectancy** — are commonly unacquainted with the real value of their interests, and, if short-sighted, or in want, or trouble, are, like Esau, tempted to sacrifice large future advantages to a little present good. Therefore “a contract with a person for the sale or charge of property in expectancy, whether as reversioner, or remainderman, or whether as expectant heir, or as expectant devisee or legatee of another, raises a presumption against the purchaser, which he must be prepared to rebut in order to support the contract.”³ And it is believed that all cases within the principle of this rule, however differing in form, should be decided upon it. When, therefore, a husband died, leaving property to his widow, and immediately thereon she relinquished a large amount of it for a small consideration, this contract was by the court cancelled.⁴ Perhaps this case may be deemed also to be one of —

§ 740. **Undue Influence.** — The doctrine of undue influence, applied more frequently in courts of equity where it has been chiefly developed, is adapted to great varieties of differing facts,⁵ and it is of wide extent. Therefore it does not admit

Lamplugh v. Cox, 1 Dick. 411; Barnett v. Spratt, 4 Ire. Eq. 171; Esham v. Lamar, 10 B. Monr. 43, and cases cited to next section.

¹ Robertson v. Smith, 11 Texas, 211.

² Caplice v. Kelley, 27 Kan. 359; Kelley v. Caplice, 23 Kan. 474. And see Botkin v. Livingston, 21 Kan. 232;

Thomson v. Eastwood, 2 Ap. Cas. 215; Wood v. Abrey, 3 Madd. 417, 424.

³ Leake Con. 427, referring to Chesterfield v. Janssen, 2 Ves. sen. 125; White & T. Lead. Cas. 3d ed. 483.

⁴ Stewart v. Stewart, 7 J. J. Mar. 183.

⁵ Williams v. Bayley, Law Rep. 1 H. L. 200, 212.

of being more minutely defined than simply to say, that, when the parties sustain to each other any relation implying mutual confidence,¹ — such, for example, as trustee and *cestui que trust*,² attorney and client,³ other agent and principal,⁴ executor or administrator and legatee or heir,⁵ and various others,⁶ — any bargain by which the one acquires anything from the other, or from a third person while acting for the other, will, as between the parties, be held invalid unless duly explained, and the acquisitions of the employed from a third person will accrue to the benefit of the employer; or, where the parties do not sustain such mutual relation, a like consequence will follow if habitually the actions of the one are controlled by the other,⁷ or if in the particular instance⁸ the one procured the consent of the other to the bargain by any undue pressure upon him. It is seen that this is a part of the doctrine, already stated,⁹ of the mingling of influences inthralling the will. Fully to explore it would not be within the scope of the present work, but something more will be said in other connections, and a further word here concerning it may be desirable. Thus, —

§ 741. **One in Another's Power** — may, on application to the equity tribunal, have cancelled an inequitable bargain to

¹ *Morse v. Royal*, 12 Ves. 355, 372; *Earle v. Chace*, 12 R. I. 374; *Smith v. Sweeney*, 69 Ala. 524; *Mulock v. Mulock*, 4 Stew. Ch. 594; *Jamison v. Glascock*, 29 Misso. 191; *Dent v. Bennett*, 7 Sim. 539; *Cocking v. Pratt*, 1 Ves. sen. 400; *McCarthy v. Decaix*, 2 Russ. & M. 614.

² *Rhodes v. Bate*, Law Rep. 1 Ch. Ap. 252; *Jewett v. Miller*, 6 Selden, 402; *Barney v. Saunders*, 16 How. U. S. 535; *Johnson v. Johnson*, 5 Ala. 90; *Crutchfield v. Haynes*, 14 Ala. 49; *Pugh v. Pugh*, 9 Ind. 132; *Baugh v. Walker*, 77 Va. 99.

³ *Yonge v. Hooper*, 73 Ala. 119; *McPherson v. Watt*, 3 Ap. Cas. 254; *Ryan v. Ashton*, 42 Iowa, 365; *Tyrell v. Bank of London*, 10 H. L. Cas. 26, 8 Jur. n. s. 849; *Wright v. Walker*, 30 Ark. 44; *Newman v. Davenport*, 9

Baxter, 538; *Jones v. Thomas*, 2 Y. & Col. Ex. 498.

⁴ *Morgan v. Elford*, 4 Ch. D. 352; *Davis v. Hamlin*, 108 Ill. 39; *Tappan v. Aylsworth*, 13 R. I. 582; *Whelan v. McCreary*, 64 Ala. 319; *Greenfield Savings Bank v. Simons*, 133 Mass. 415.

⁵ *Mosely v. Lane*, 27 Ala. 62; *Rice v. Gordon*, 11 Beav. 265; *Williams v. Powell*, 66 Ala. 20. See *Clark v. Clark*, 9 Ap. Cas. 733.

⁶ "It matters not what the relation is, if confidence is reposed and influence obtained." *Seever v. C. J. in Leighton v. Orr*, 44 Iowa, 679, 689.

⁷ *Leighton v. Orr*, supra; *Bivins v. Jarnigan*, 3 *Baxter*, 282.

⁸ *Long v. Mulford*, 17 Ohio State, 484, 504, 505; *Smith v. Kay*, 7 H. L. Cas. 750.

⁹ Ante, § 733.

which he was entrapped or practically compelled, though there has been neither technical fraud nor technical duress.¹ In short, —

§ 742. **Any Complications** — in which a party may find himself involved, whereby his act of contracting is not that of a free agent, may, at least in equity, be availed of by him to avoid it, as against those by whose procurement it was made.² And —

§ 743. **Third Persons.** — Even third persons may exert the influence which will work the nullifying result. It was so, for example, where a young woman had been persuaded by an uncle to execute a deed giving lands to two aunts; the deed was, under the special circumstances, set aside.³

§ 744. *The Doctrine of this Chapter restated.*

The teachings of this chapter emphasize, what is laid down in various other connections, that one entering into a contract is perfectly bound only when his disenthralled will concurs. There were, under the older practice, and there still remain in a part of our States, some technical exceptions to this proposition available in the common-law courts, wherefrom relief would be had in equity. But this sort of obstruction to justice is being gradually removed with the advancing enlightenment of our jurisprudence. A further repetition of doctrines does not seem to be here required.

¹ Ante, § 726; *Birdsong v. Birdsong*, 2 Head, 289; *Whelan v. Whelan*, 3 Cow. 537; *Williams v. Bayley*, Law Rep. 1 H. L. 200; *Davenport v. Cole*, 2 Halst. 522, 527.

² *Yard v. Yard*, 12 C. E. Green, 114. And see *Gibbs v. Linabury*, 22 Mich. 479.

³ *Ranken v. Patton*, 65 Misso. 378.

CHAPTER XXVII.

THE UNAUTHORIZED ALTERING OF THE WRITTEN
CONTRACT.

§ 745. **The Decisions** — and judicial *dicta*, on the subject of this chapter, are in some degree conflicting and unsatisfactory. Still, on the whole, they are rational and just, sustaining, but not at all points quite unanimously, the doctrine of reason; namely, —

§ 746. **Doctrine defined.** — If, while a written contract remains executory, a party unauthorized so alters it as to vary its legal effect to his advantage, whether he meditates a fraud or not, — or, if, with the positive intent to defraud, he makes in it any alteration whatever, — or, if another thus alters it under authority from him, — or, if one to whose custody he simply commits it makes in it a material alteration advantageous to him, — then, at the election of the other party, he is estopped from relying upon it in a court of justice.

§ 747. **Why?** — Plainly, in reason, after a party has intentionally altered the contract, thus abandoning it in its original form, he cannot before the tribunal reclaim what *in pais* he had cast aside; and he cannot rely on the new form of words, because to them the other party had not consented.¹ Though this proposition is a little less broad than the doctrine above stated, so that on it not quite all the doctrine finds support, the residue rests well on the further reason that, without it, there can be no adequate protection of honest parties against the frauds of the dishonest.²

¹ And see *Coburn v. Webb*, 56 Ind. 96, 100. yon, C. J. in *Master v. Miller*, 4 T. R. 320, 329, 330.

² And see observations of Lord Ken-

§ 748. **Party's Election.**—In reason, on a question not fully illumined by the decisions, when a written contract has been wrongfully altered in the interest of one party, the other should have his election to repudiate it, to maintain it in its old form, or to accept the altered form; but not, with knowledge of the facts, to do the one as to some of its stipulations and the other as to others.¹ Plainly, on authority as well as reason, he may still rely on the contract as it stood before the alteration, if he will.² Hence, —

§ 749. **Voidable.**—Within the distinction of void and voidable already explained,³ though the wrongfully altered contract is often in the books termed “void,” the more accurate word is the one of variable meaning, “voidable;” because the instrument is not, to every intent, simply null.⁴ But, practically, if merely the innocent party is sued thereon, having declined voluntary payment, he will elect to make it void. Then, —

§ 750. **Innocent Third Person — (Mercantile Paper).**—Though the contract should have passed into the hands of an innocent assignee for value, and even though it should be mercantile paper, such holder will stand in a position no better than the original party. On grounds already explained, this will be so if the alteration amounts to a forgery;⁵ and, because of the general reason on which the doctrine of the nullifying effect of the alteration rests,⁶ this will be so also in the other ordinary cases. The contract will be practically void.⁷

§ 751. **Distinction of Material and Immaterial.**—In most circumstances, to appear as we proceed, the alteration will impair the contract if material, otherwise not. We have

¹ See *Pattinson v. Luckley*, Law Rep. 10 Ex. 330; *Turner v. Baker*, 30 Ark. 186.

² *Hemming v. Trenery*, 9 A. & E. 926, 934; *United States v. Spalding*, 2 Mason, 478; *Cutts v. United States*, 1 Gallis. 69.

³ Ante, § 610 et seq.

⁴ Ante, § 617.

⁵ Ante, § 676.

⁶ Ante, § 747.

⁷ *Master v. Miller*, 4 T. R. 320, 2 H. Bl. 141; *Charlton v. Reed*, 61 Iowa, 166; *Wade v. Withington*, 1 Allen, 561; *Hewins v. Cargill*, 67 Maine, 554; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196; *Scofield v. Ford*, 56 Iowa, 370; *Vance v. Lowther*, 1 Ex. D. 176.

seen what inaccuracies interpretation will correct.¹ Practically, if a man holds a contract wherein there is an inaccuracy of this sort, he should leave it to the correction of interpretation, and not take upon himself the work unauthorized. Still, in point of law, if he does make the correction honestly, it is classed with the harmless immaterial.² And such is any alteration which in no degree varies the legal effect of the writing.³ But an alteration which does vary it, however minutely (assuming it to be prejudicial to the other party), is material.⁴ In our chapter on interpretation as to the meaning of contracts,⁵ we saw into what a variety of things the interpreter looks. Now, before a judge can say that an alteration does or does not change a contract in its legal import, he must interpret it both in its original and its altered forms. Therefore a specification of material alterations will mislead the practitioner more than it will help him, unless he is cautious. Adding interest or increasing the rate,⁶ changing the date⁷ yet not ordinarily inserting the true date where none appears,⁸ defacing or adding a seal,⁹ changing the place¹⁰ or time¹¹ of payment, detaching a qualifying memorandum,¹²

¹ Ante, § 383.

² *Leonard v. Phillips*, 39 Mich. 182; *McRaven v. Crisler*, 53 Missis. 542; *Waugh v. Bussell*, 1 Marshall, 214, 311, 5 Taunt. 707.

³ *Marson v. Petit*, 1 Camp. 82, note; *Sharpe v. Orme*, 61 Ala. 263; *Kline v. Raymond*, 70 Ind. 271; *Burlingame v. Brewster*, 79 Ill. 515; *Crawford v. Dexter*, 5 Saw. 201; *Rowley v. Jewett*, 56 Iowa, 492.

⁴ Cases cited to the subsequent notes to this section; also *Laub v. Paine*, 46 Iowa, 550; *Kelly v. Trumble*, 74 Ill. 428; *Osborne v. Van Houten*, 45 Mich. 444; *Robinson v. Reed*, 46 Iowa, 219; *Powell v. Divett*, 15 East, 29; *White v. Johns*, 24 Minn. 387; *Knill v. Williams*, 10 East, 431.

⁵ Ante, § 365.

⁶ *Harsh v. Klepper*, 28 Ohio State, 200; *Long v. Mason*, 84 N. C. 15; *Davis v. Henry*, 13 Neb. 497; *Hert v. Oehler*, 80 Ind. 83; *Bowman v. Mitchell*, 79

Ind. 84; *Lewis v. Shepherd*, 1 Mackey, 46; *Craighead v. McLoney*, 3 Out. Pa. 211; *Kennedy v. Moore*, 17 S. C. 464; *Plyler v. Elliott*, 19 S. C. 257.

⁷ *Hamilton v. Wood*, 70 Ind. 306; *Brown v. Straw*, 6 Neb. 536.

⁸ Ante, § 114, 178, 543; *Keane v. Smallbone*, 17 C. B. 179; *Lemay v. Johnson*, 35 Ark. 225.

⁹ *Evans v. Williamson*, 79 N. C. 86; *Vaughan v. Fowler*, 14 S. C. 355; *Davidson v. Cooper*, 13 M. & W. 343.

¹⁰ *Adair v. Eglant*, 58 Iowa, 314; *Cowie v. Halsall*, 4 B. & Ald. 197, 3 Stark. 36.

¹¹ *Alderson v. Langdale*, 3 B. & Ad. 660. See *Hayes v. Wells*, 34 Md. 512.

¹² *Scofield v. Ford*, 56 Iowa, 370; *Gerrish v. Glines*, 56 N. H. 9; *Palmer v. Largent*, 5 Neb. 223; *Davis v. Henry*, 13 Neb. 497. See *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77.

commonly but not in all circumstances adding or releasing parties,¹ adding or altering words of negotiability,² — these are severally instances of material alterations.

§ 752. **Reformable in Equity.** — Where the contract fails to express what both parties meant, so that, though mere interpretation will not correct it, equity will reform it,³ the question whether or not an honest alteration by one of the parties without the other's consent, making it what equity would decree it to be, will vitiate it, is not absolutely clear. Evidently that is a dangerous liberty which permits one to exercise this jurisdiction in his own case, without notice to the other party, and *in pais*. Yet there seems to be authority for it.⁴

§ 753. **Alteration by Stranger — (By Accident).** — It has been said that "a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state."⁵ From which proposition the English courts derive the doctrine, that if, while the instrument is in the custody of a party, a stranger makes in it a material (not extending to an immaterial) alteration, the contract is thereby nullified.⁶ But neither in England nor in this country does

¹ *John v. Hatfield*, 84 Ind. 75; *Al-drich v. Smith*, 37 Mich. 468; *Briscoe v. Reynolds*, 51 Iowa, 673; *Nicholson v. Combs*, 90 Ind. 515; *Dickerman v. Miner*, 43 Iowa, 508.

² *Needles v. Shaffer*, 60 Iowa, 65; *Hollis v. Vandergrift*, 5 Houst. 521.

³ Ante, § 707-713.

⁴ In *McRaven v. Crisler*, 53 Missis. 542, dissenting from *Miller v. Gilleland*, 7 Harris, Pa. 119, the court, speaking by Chalmers, J. (p. 546) said: "But even if it be deemed a material alteration, we think it is equally clear that it did not vitiate the note. It was but the correction of a mistake so as to conform the note to the intention of both the parties to it, and it was made in such manner as clearly to negative any fraud upon the part of the payee, or any intention to obtain an advantage. That under these circumstances alterations in notes will not vitiate them, we think, is well set-

tled. The only questions in such cases are, Does the alteration actually conform to the true intention of both parties to the instrument? and was it honestly made to correct the mistake, and with no intent of procuring an advantage? Where these questions are answered in the affirmative, the law will presume or dispense with the assent of the maker of the note to its alteration." Referring to 2 Pars. Bills, 569, 570; *Chit. Bills*, 184, 185; *Bayley Bills*, 90; *Kershaw v. Cox*, 3 Esp. 246; *Knill v. Williams*, 10 East, 431; *Brutt v. Picard*, *Ryan & Moody*, N. P. 37; *Clute v. Small*, 17 Wend. 237; *Hervey v. Harvey*, 15 Maine, 357; *Bowers v. Jewell*, ² N. H. 543; *Boyd v. Brotherson*, 10 Wend. 93.

⁵ Lord Denman, C. J. in *Davidson v. Cooper*, 13 M. & W. 343, 352.

⁶ *Pigot's Case*, 11 Co. 26 b; *Davidson v. Cooper*, *supra*; *Burchfield v.*

an alteration purely accidental produce such effect.¹ In reason, an alteration by a stranger is, as to the party who is keeping it carefully and not negligently in his custody, accidental. And it is the better doctrine, abundantly established with us, that, in the absence of fraud or negligence in the party, one not a party, a custodian, or otherwise connected with a written contract, does not impair any rights under it if, without authority, he alters or destroys it, provided its original contents can be proved.² But—

§ 754. **By Custodian.** — The custodian of an instrument stands, in a measure, in the place of him for whose benefit he holds it; rendering an alteration by him, though without specific evidence of authority, in a general way the same as if done by the party's own hand.³ Still it is very properly held that one merely intrusted with an instrument is not therefore authorized to alter it,⁴ and there is some doubt as to the extent to which our American tribunals will carry out the doctrine just stated.⁵ One case holds that a trustee's alteration does not take away the rights of a *cestui que trust*.⁶

§ 755. **By Party.** — An alteration by the party himself, whether acting in person or through an authorized agent, if not material,⁷ — that is, if it does not vary the interpretation to the prejudice of the other party,⁸ — and if done hon-

Moore, 3 Ellis & B. 683, 687; 2 Chit. Con. 11th Am. ed. 1161.

¹ Leake Con. 807 (referring to Shep. Touch. by Prest. 69; Argoll v. Cheney, Palmer, 402, also cited in Bolton v. Carlisle, 2 H. Bl. 259, 262); Van Riswick v. Goodhue, 50 Md. 57; Hunt v. Gray, 6 Vroom, 227.

² Condict v. Flower, 106 Ill. 105; Robertson v. Hay, 10 Norris, Pa. 242; Evans v. Williamson, 79 N. C. 86; Henfree v. Bromley, 6 East, 309, 311; Piersol v. Grimes, 30 Ind. 129; Davis v. Carlisle, 6 Ala. 707; Croft v. White, 36 Missis. 455; Medlin v. Platte, 8 Misso. 235; Lubbering v. Kohlbrecher, 22 Misso. 596; Nichols v. Johnson, 10 Conn. 192; Bigelow v. Stilphen, 35 Vt. 521; Terry v. Hazlewood, 1 Duvall, 104; Rees v. Overbaugh, 6 Cow. 746;

Fullerton v. Sturges, 4 Ohio State, 529.

³ Pattinson v. Luckley, Law Rep. 10 Ex. 330, 333; Morrison v. Welty, 18 Md. 169; Vance v. Lowther, 1 Ex. D. 176. See Bigelow v. Stilphen, 35 Vt. 521.

⁴ Coburn v. Webb, 56 Ind. 96; Lemay v. Williams, 32 Ark. 166.

⁵ Compare Nickerson v. Swett, 135 Mass. 514.

⁶ Flinn v. Brown, 6 S. C. 209, 214.

⁷ Ante, § 751.

⁸ Ogle v. Graham, 2 Pa. 132; Montgomery Railroad v. Hurst, 9 Ala. 513; Broughton v. West, 8 Ga. 248; Huntington v. Finch, 3 Ohio State, 445, 448; Brownell v. Winnie, 29 N. Y. 400; Union Bank v. Cook, 2 Cranch C. C. 218. It seems, however, to be the doc-

estly and in good faith, does not impair the contract.¹ But where, in making an immaterial alteration, he means a fraud, yet mistaking the law does not accomplish his purpose, the other party will, in reason, be discharged; and this conclusion is believed to be sufficiently deducible from the adjudications, though they are not so distinct to this point as to some others.² An alteration which, to any degree, varies the legal effect of the instrument³ to the prejudice of the other party, releases the latter from it though no actual fraud is meditated; the alteration is a fraud in law, where not in fact.⁴

§ 756. **Restoring after Alteration.** — If an alteration has been made by accident,⁵ with no intermingling of evil purpose, it may be erased, or otherwise the instrument may be restored to its original condition, and it will then have its original effect.⁶ This is so especially where the instrument is negotiable, and is in the hands of an innocent holder.⁷

trine of some courts, that a material alteration, though not prejudicial to the other party, discharges him. *Bowers v. Briggs*, 20 Ind. 139; *Chadwick v. Eastman*, 53 Maine, 12; *Mollett v. Wackerbarth*, 5 C. B. 181.

¹ *Hunt v. Adams*, 6 Mass. 519; *The State v. Cilley*, cited 1 N. H. 97; *Rhoades v. Castner*, 12 Allen, 130; *Park v. Glover*, 23 Texas, 469; *Nichols v. Johnson*, 10 Conn. 192; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Burnham v. Ayer*, 35 N. H. 351; *Langdon v. Paul*, 20 Vt. 217; *Reed v. Kemp*, 16 Ill. 445; *Dunn v. Clements*, 7 Jones, N. C. 58; *The State v. Dean*, 40 Misso. 464; *Shelton v. Deering*, 10 B. Monr. 405; *Aldous v. Cornwell*, Law Rep. 3 Q. B. 573; *Major v. Hansen*, 2 Bis. 195; *Huntington v. Finch*, 3 Ohio State, 445. On this point *Pigot's Case*, 11 Co. 26 b is the other way.

² 1 Greenl. Ev. § 568; *Montgomery Railroad v. Hurst*, 9 Ala. 513; *Adams v. Frye*, 3 Met. 103; *Nunnery v. Cotton*, 1 Hawks, 222; *Lewis v. Payn*, 8 Cow. 71; *Wright v. Wright*, 2 Halst. 175; *Malin v. Malin*, 15 Johns. 293. Contra,

Moye v. Herndon, 30 Missis. 110. Compare this doctrine with *Pigot's Case*, supra.

³ Ante, § 751.

⁴ *Porter v. Doby*, 2 Rich. Eq. 49; *Washington Savings Bank v. Ecky*, 51 Misso. 272; *Boston v. Benson*, 12 Cush. 61; *Richmond Manuf. Co. v. Davis*, 7 Blackf. 412; *Mollett v. Wackerbarth*, 5 C. B. 181; *Wheelock v. Freeman*, 13 Pick. 165, 168; *Stoddard v. Penniman*, 108 Mass. 366; *Schwalm v. McIntyre*, 17 Wis. 232; *Smith v. Mace*, 44 N. H. 553; *Hirschman v. Budd*, Law Rep. 8 Ex. 171; *Hirschfeld v. Smith*, Law Rep. 1 C. P. 340, 353; *Fay v. Smith*, 1 Allen, 477.

⁵ Ante, § 753.

⁶ *Rogers v. Shaw*, 59 Cal. 260; *Horst v. Wagner*, 43 Iowa, 373.

⁷ *Horst v. Wagner*, supra; *Shepard v. Whetstone*, 51 Iowa, 457; *Adams, J.* observing: "That there is upon grounds of public policy a valid objection to enforcing, under some circumstances, a contract which has been altered, notwithstanding its restoration, seems to be well settled. This is so where the alter-

§ 757. **Rights after Alteration — (Destruction).** — It is but repetition to say that one can recover nothing on a contract which he has materially altered,¹ nor can he maintain any affirmative defence thereon.² The decisions are not quite distinct and uniform as to the effect on a collateral demand for substantially the same thing. It is generally held that, where the owner and payee of a promissory note has voluntarily destroyed it, he can no more recover upon the consideration for which it was given than upon the note itself.³ But some courts have permitted the party in this class of cases to proceed for the consideration, or for the collateral matter, especially where the destruction or alteration was unaccompanied by fraud.⁴ In reason, aside from the question of fraud, if one is sued on any form of indebtedness, and it appears in evidence that a promissory note or other contract was given to secure or pay the debt, such contract must be surrendered to be cancelled, or its non-production accounted for, before judgment can be rendered for the plaintiff. And it will not satisfy this rule to show a contract which the plaintiff has intentionally so altered as to nullify it, or intentionally destroyed.

ation was made with intent to defraud, and the instrument remains in the hands of the person making the alteration. Perhaps, indeed, it should be so held in the absence of any intent to defraud. *Hall v. McHenry*, 19 Iowa, 521, 523. See, however, 2 Pars. Notes and Bills, 270. But conceding that the importance of discouraging the alteration of instruments is such that a court is justified in declaring invalid an instrument which has been altered, and which remains in the hands of the person who made the alteration, notwithstanding the restoration of the instrument, it is evident that it should not be held invalid in the hands of an innocent purchaser for value. The punishment of an innocent person for an act done by another has no tendency to subserve the public interest or promote the public security." p. 458. See ante, § 750; *Plyler v. Elliott*, 19 S. C. 257.

¹ Ante, § 755; *Taylor v. Taylor*, 12 Lea, 714; *Schnewind v. Hackett*, 54 Ind. 248.

² *Robbins v. Magee*, 76 Ind. 381.

³ *Booth v. Smith*, 3 Woods, 19 (referring to *Angel v. Felton*, 8 Johns. 149; *Vanauken v. Hornbeck*, 2 Green, N. J. 178; *Fisher v. Mershon*, 3 Bibb, 527; *Blade v. Noland*, 12 Wend. 173; *Joannes v. Bennett*, 5 Allen, 169, 173; *Broadwell v. Stiles*, 3 Halst. 58; *Nagel v. Mignot*, 7 Mart. La. 657); *Martendale v. Follet*, 1 N. H. 95; *McVey v. Ely*, 5 Lea, 438. The same was adjudged also in a case where the destruction was fraudulent. *McDonald v. Jackson*, 56 Iowa, 643. And see *Tate v. Fletcher*, 77 Ind. 102.

⁴ *Clough v. Seay*, 49 Iowa, 111; *Eckert v. Pickel*, 59 Iowa, 545; *Goodenow v. Curtis*, 33 Mich. 505; *Atkinson v. Hawdon*, 2 A. & E. 628.

§ 758. **Executed.** — If, before alteration, the contract has had its effect and is ended,¹ — as, if it is a deed of lands, delivered, and the title vested in the grantee, — an alteration; however fraudulent, does not undo what has thus been done.² But no executory part can be enforced.³

§ 759. **All Written Contracts,** — whether simple or under seal, on whatever subjects, are equally within the doctrines of this chapter. Contrary intimations, in some older cases, are not sound in principle, and they are now discarded.⁴

§ 760. **The Evidence** — is practically of special consequence in these cases. It is not within the scope of the present work. Unhappily the wilderness of decisions relating thereto is a tangle of discord, uncertainty, and doubt.⁵

§ 761. *The Doctrine of this Chapter restated.*

One in possession of a written contract is required both by duty and common prudence carefully to preserve it. If, while a party is endeavoring to discharge this duty, a third person gains unlawful access to the writing and alters or destroys it, — or, if with innocent purpose the party makes himself some alteration therein not prejudicial to the other party or varying its meaning, — his rights under it will not thereby be impaired. But if he commits its custody to one who materially alters it in his interest, — or, if he authorizes another so to alter it, and it is done, — or, if he does it himself, — he forfeits, by this bad faith or want of due care, whatever the contract gave him. Yet if it has already taken effect, and his rights have become vested, no alteration of the defunct contract can revest them in the other party.

¹ *Ransier v. Vanorsdol*, 50 Iowa, 130.

² *Collier v. Jacoby*, 9 Cow. 125; *Kendall v. Kendall*, 12 Allen, 92; *Speer v. Speer*, 7 Ind. 178; *Chessman v. Whittemore*, 23 Pick. 231; *Lewis v. Payn*, 8 Cow. 71; *Gillespie v. Reed*, 3 McLean, 377. See *Wallace v. Harmstad*, 8 Wright, Pa. 492; *Carithers v. Lay*, 51 Ala. 390.

³ *Arrison v. Harmstead*, 2 Barr, 191;

Wallace v. Harmstad, 3 Harris, Pa. 462; *Waring v. Smyth*, 2 Barb. Ch. 119.

⁴ *Aldous v. Cornwell*, Law Rep. 3 Q. B. 573.

⁵ Consult, besides the digests, 1 Greenl. Ev. § 564; 2 Pars. Con. 721, 722; 2 Chit. Con. 11th Am. ed. 1163, and a very full note in this edition, reviewing at large both the English and American cases.

CHAPTER XXVIII.

ALTERING THE CONTRACT BY MUTUAL CONSENT.

§ 762. **The Doctrine** — of this chapter is, that, as between parties, not speaking of rights which third persons may have acquired, those who have made a contract may mutually alter it at pleasure. But, in doing this, they must conform to any technical rules which were required for its original construction.

§ 763. **Before Signing and Delivery.** — Alterations made in the draft of a contract, before it becomes complete by delivery, stand on independent grounds, quite apart from the doctrines both of this chapter and of the last. Ordinarily they are as completely without effect as the erasure and substitution of a word by the scrivener while setting down the proposed terms.¹ If the unexecuted instrument has been read by a party, then altered before he signs it, it may or not, according to the circumstances, be invalid on the already considered ground² of fraud.³

§ 764. **Simple Contract, by Writing.** — After parties have executed a written contract not under seal, they may mutually change the words and sentences as they please;⁴ thereby they create a new contract,⁵ consisting of the old and new parts blended. But —

§ 765. **Party not consenting.** — A surety,⁶ or a third party,⁷

¹ *Sherrington v. Jermyn*, 3 Car. & P. 374; *Webber v. Maddocks*, 3 Camp. 1; *Hollis v. Vandergrift*, 5 Houst. 521; *Jacob v. Hart*, 6 M. & S. 142, 2 Stark. 45; *Stevens v. Lloyd*, *Moody & M.* 292.

² Ante, § 645-649.

³ *Linington v. Strong*, 107 Ill. 295.

⁴ *Wilson v. Henderson*, 9 Sm. & M. 375; *People v. Call*, 1 Denio, 120.

⁵ Ante, § 164, 174; *Vicary v. Moore*, 2 Watts, 451; *Dana v. Hancock*, 30 Vt. 616; *Briggs v. Vermont Central Railroad*, 31 Vt. 211; *Lawall v. Rader*, 12 Harris, Pa. 283.

⁶ *Gardiner v. Harback*, 21 Ill. 129; *Ryan v. Parker*, 1 Ire. Eq. 89; *Darwin v. Rippey*, 63 N. C. 318.

⁷ *Crockett v. Thomason*, 5 Sneed,

not consulted about the alteration or not consenting, is thereby discharged. It is good as to those who do consent.¹

§ 766. **Oral Altering of Simple Written.** — Since oral contracts and written ones not under seal are of equal grade,² parties may orally alter their written agreement, rendering it thereby in legal contemplation oral;³ except in cases where, by a statute or some rule of the unwritten law, writing is essential to its validity.⁴ Even —

§ 767. **Clause forbidding.** — Though the written contract has a clause forbidding such oral alteration, and declaring that no change in it shall be valid unless in writing, such provision does not become a part of the law of the land; it is like any other agreement which is superseded by a new one. So that, in spite of it, an oral alteration may be validly made.⁵

§ 768. **Consideration — (New Contract).** — As the altered contract becomes in contemplation of law a new one,⁶ there must be for it a consideration the same as for any other. But the transaction embraces also the cancelling of the old contract; and such cancelling, assuming the old to have been valid, is an adequate consideration for the new.⁷ Still it is

Tenn. 342; *Goodman v. Eastman*, 4 N. H. 455; *King v. Hunt*, 13 Misso. 97; *Fay v. Smith*, 1 Allen, 477; *Prettyman v. Goodrich*, 23 Ill. 330.

¹ *Warring v. Williams*, 8 Pick. 322; *Broughton v. Fuller*, 9 Vt. 373; *The State v. Van Pelt*, 1 Ind. 304; *Smith v. Weld*, 2 Barr, 54. And see *Harper v. The State*, 7 Blackf. 61; *Briggs v. Glenn*, 7 Misso. 572.

² Ante, § 27, 158.

³ Ante, § 133, 164.

⁴ *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Cartright v. Clopton*, 25 Ga. 85; *Langford v. Cummings*, 4 Ala. 46; *Miles v. Roberts*, 34 N. H. 245; *Richardson v. Cooper*, 25 Maine, 450; *Grafton Bank v. Woodward*, 5 N. H. 99; *Frost v. Everett*, 5 Cow. 497; *Keating v. Price*, 1 Johns. Cas. 22; *Rhodes v. Thomas*, 2 Ind. 638; *Brown v. Everhard*, 52 Wis. 205.

⁵ *McFadden v. O'Donnell*, 18 Cal. 160; *Westchester Fire Ins. Co. v. Earle*,

33 Mich. 143; *Smith v. Gugerty*, 4 Barb. 614; *Ford v. United States*, 17 Ct. of Cl. 60; *Carrugi v. Atlantic, &c. Ins. Co.* 40 Ga. 135. Contra, *White v. San Rafael, etc. Railroad*, 50 Cal. 417. See *Barker v. Troy and Rutland Railroad*, 27 Vt. 766; *Illinois Deaf and Dumb Inst. v. Platt*, 5 Bradw. 567.

⁶ Ante, § 764 and places there referred to.

⁷ Ante, § 68; *Weld v. Nichols*, 17 Pick. 538, 543; *Munroe v. Perkins*, 9 Pick. 298, 305; *Scott v. McKinney*, 98 Mass. 344, 348; *Woodward v. Miles*, 4 Fost. N. H. 289; *Connelly v. Devoe*, 37 Conn. 570; *Montgomery v. Morris*, 32 Ga. 173; *Taylor v. Meek*, 4 Blackf. 388; *Perry v. Buckman*, 33 Vt. 7; *Hildreth v. Pinkerton Academy*, 9 Fost. N. H. 227; *Doyle v. Dixon*, 97 Mass. 208; *Calhoun v. Calhoun*, 37 Missis. 668; *Spann v. Baltzell*, 1 Fla. 301. In *Thurston v. Ludwig*, 6 Ohio State, 1, the reasoning is a little unsatisfactory.

otherwise if the old was invalid.¹ A mere promise by the one party, with no relinquishment of anything by the other, is void for the want of consideration.² And there may be cases wherein, as the law views the transaction, a nominal concurrence of the parties amounts only to a promise by the one with nothing surrendered by the other; then, of course, the promise, to be binding, must be supported by a fresh consideration.³

§ 769. **Where Writing Indispensable.** — From the doctrine that the altered contract is in law a new one, it further results that, in cases where writing is essential to its validity, the alteration must be in writing, or either it will be ineffectual or it will destroy the contract altogether.⁴ Thus, —

§ 770. **Promissory Note.** — By the law-merchant, an oral promissory note is impossible; it must be in writing.⁵ Consequently an oral agreement varying such a note is repugnant to the whole transaction, and it will be rejected as void.⁶ Again, —

§ 771. **Statute of Frauds.** — Agreements which, to be valid, must by the Statute of Frauds be in writing, cannot be orally varied. The admission of the evidence would introduce a repugnancy, therefore it must be rejected;⁷ or, otherwise expressed, the oral is void, by reason of which it cannot annul what is valid.⁸ Still there are cases in which the intent to depart from the writing by substituting an oral provision is

¹ *Louisville Bank v. Young*, 37 Misso. 398; *Holden v. Cosgrove*, 12 Gray, 216; *Crosby v. Wood*, 2 Selden, 369; *Van Allen v. Jones*, 10 Bosw. 369.

² Ante, § 77; *Robbins v. Potter*, 98 Mass. 532; *Richardson v. Williams*, 49 Maine, 558; *Styron v. Bell*, 8 Jones, N. C. 222; *Bixler v. Ream*, 3 Pa. 282. And see *Collins v. Baumgardner*, 2 Smith, Pa. 461.

³ *McDugald v. McFadgin*, 6 Jones, N. C. 89; *Peelman v. Peelman*, 4 Ind. 612; *Colcock v. Louisville, &c. Railroad*, 1 Strob. 329; *Clark v. Small*, 6 Yerg. 418; *Whitson v. Fowlkes*, 1 Head, 533; *Hawley v. Farrar*, 1 Vt. 420; *Barlow v.*

Smith, 4 Vt. 139; *Clifton v. Litchfield*, 106 Mass. 34.

⁴ Ante, § 130, 133, 136, 164, 174, 391-396; *Hill v. Blake*, 97 N. Y. 216.

⁵ Ante, § 152.

⁶ *Adler v. Friedman*, 16 Cal. 138. The proposition of the text is obvious, and does not require the support of authority. If it did, I should not deem this case adequate; for, neither by necessary implication, nor by any distinct utterance, does it exactly cover the proposition.

⁷ *Giraud v. Richmond*, 2 C. B. 835; *Moore v. Campbell*, 10 Exch. 323.

⁸ *Noble v. Ward*, Law Rep. 2 Ex. 135, 138.

so evident as to render the rejection of the latter impossible; and then, the written contract being gone, the whole will come under the condemnation of the statute.¹ On the other hand, if the oral variation stops at a point which leaves a sufficient memorandum in writing to satisfy the statute, it may have effect, the same as though no writing was originally necessary. On this ground, some courts hold that the time of performance may be orally varied,² while others maintain the contrary.³

§ 772. *Specialties*:—

In General.—In an early chapter, the outlines of the law of specialties appear.⁴ The adjudications on the subject of altering this form of contract are in confusion; but, if we look into the principles which should govern them, we shall find the results to be as follows:—

§ 773. **Where Sealing not Essential.**—If the particular contract, though under seal, is not required by the law to be so, there is no objection to varying it without seal, thus reducing the whole to a simple contract.⁵ But the presumption will be violent that this is not meant, and the change will be held to take place only where the intent is clear.⁶ And never, where a sealed instrument is altered without seal, will it remain a specialty.⁷

§ 774. **Where Sealing Essential.**—From the reasoning in the last section, in other parts of this chapter, and in preceding chapters,⁸ the conclusion becomes inevitable, that, in all cases where the instrument if not sealed would be ineffectual for its purpose, an interpretation giving force to an unsealed alteration, thereby destroying the contract contrary to the evident intent of the parties, should if possible be avoided. Therefore, except where plainly impossible, the attempted alteration should be adjudged null.

¹ Sanderson v. Graves, Law Rep. 10 Ex. 234.

² Stearns v. Hall, 9 Cush. 31.

³ Stead v. Dawber, 10 A. & E. 57; Noble v. Ward, Law Rep. 1 Ex. 117, 2 Ex. 135.

⁴ Ante, § 103-139.

⁵ Ante, § 133.

⁶ See Burnes v. Allen, 9 Ire. 370.

⁷ Vaughn v. Ferris, 2 Watts & S. 46;

Eddy v. Graves, 23 Wend. 82; Robbins v. Ayres, 10 Misso. 538.

⁸ Ante, § 129-138, 391-396.

§ 775. *How Validly Altered.*—The foregoing expositions are for cases where the matter introduced by way of alteration cannot be deemed so incorporated with the old as to be also under, or governed by, its seal. But, where due formalities are observed, a specialty can be mutually altered by the parties as freely as a simple contract. There are differences of opinion, with some confusion in the adjudications, as to what the formalities must be. All admit that if, while the delivered contract is in its executory condition, the parties are together, and thereupon the instrument is handed back to him who sealed it, and then the latter alters it by consent of the other, or assents to an alteration made by a third person in his presence, and re-delivers it, the transaction will be valid. And it appears to be the doctrine of some of the tribunals that nothing less will suffice.¹ Nor, since an authority to an agent to seal an instrument must itself be under seal,² so that there can be no original entering into a sealed contract except where the parties act in person, or, if one is absent, where the agent's power is by writing sealed, can, in reason, much less suffice. Yet some of the cases, particularly the American, appear to concede the validity of proceedings less strict. It would be difficult to derive from them any exact rule.³

§ 776. *The Doctrine of this Chapter restated.*

Any contract may be varied by the parties before performance; for the power from the law to enter into the bargain equally authorizes them to abrogate or modify it. But where only in some special form, such as writing, or a writing sealed,

¹ *Zouch v. Claye*, 2 Lev. 35; *Weeks v. Maillardet*, 14 East, 568; *Markham v. Gonaston*, Cro. Eliz. 626, 9 East, 354, note; *Matson v. Booth*, 5 M. & S. 223, 226, 227; *Smith v. Crooker*, 5 Mass. 538; *Lewis v. Bingham*, 4 B. & Ald. 672.

² Post, § 1045.

³ See, as representing various American views, *Cotten v. Williams*, 1 Fla.

37; *Thompson v. Williams*, 1 Fla. 56; *McIntyre v. Park*, 11 Gray, 102; *Cleaton v. Chambliss*, 6 Rand. 86; *Ex parte Decker*, 6 Cow. 60; *Speake v. United States*, 9 Cranch, 28; *Boardman v. Williams*, 1 Stew. 517; *Woolley v. Constant*, 4 Johns. 54; *Ex parte Kerwin*, 8 Cow. 118. And see, as to filling blanks, post, § 1165–1176.

is the particular sort of contract valid, the alteration to be effectual must be made in a way to preserve the form. Out of this plain proposition, and out of attempts of parties to reagree in disregard of it, grow the difficulties connected with the subject of this chapter. They do not require to be repeated.

CHAPTER XXIX.

ELECTION AND WAIVER.

§ 777, 778. Introduction.

779-788. Election.

789-807. Waiver.

808. Doctrine of Chapter restated.

§ 777. **How the Subject.** — The law, in all its departments, is constantly presenting to the choice of people its different paths, so that a person who has elected one has waived another. The doctrines of election and waiver, therefore, belong together. We shall here contemplate so much only of them as pertains to contracts.

§ 778. **How in this Chapter and how divided.** — It is proposed to present here only the controlling principles, with such illustrations as will make them plain. Further details appear in connection with the several topics. We shall consider, I. Election; II. Waiver.

I. *Election.*

§ 779. **In what Cases.** — The doctrine of election applies wherever there is a plurality of rights in the alternative.¹

§ 780. **Voluntary or not — (Equity).** — Commonly the election is voluntary. But equity has a jurisdiction to compel it in some cases; as, under wills.² Or, where there are two funds, on one of which a creditor has a claim for security and another creditor has a like claim on both, the court will in

¹ *Sigmon v. Hawn*, 87 N. C. 450;
Smith v. Sanborn, 11 Johns. 59; *Melick*
v. Darling, 11 Ohio, 343.

² 2 Story Eq. § 1076 et seq.

proper circumstances restrict the latter to the fund not within reach of the former,¹ — a doctrine sometimes deemed applicable only to sureties.²

§ 781. **Defined.** — Election is the right of choice between two or more steps or things, by a person not entitled to all; or, it is the choice itself. For example, —

§ 782. **Illustrations.** — If on a sale of horses they are warranted to be what they are not, the purchaser on learning of the deception may waive the warranty and pay for them, or return them and rescind the bargain, as he chooses.³ One whose agent has done an unauthorized act has his choice to affirm or repudiate it.⁴ If one party refuses to abide by his contract, the other can ordinarily sue for the breach, or treat it as rescinded, at his election.⁵ On the breach of a covenant secured by a penalty, the party injured may, as he prefers, bring his suit on the covenant, or for the penalty.⁶ And we have seen that, in certain cases, an injured person may choose between suing for a tort and waiving it and proceeding as on a contract.⁷ These illustrations might be multiplied indefinitely.⁸

§ 783. **How elect** — (**Knowledge**). — Knowledge of the facts is indispensable to a valid election.⁹ Beyond this, there is believed to be no rule possible more definite than that there must be some distinct language, act, or omission which, illumined by the special circumstances, plainly indicates the party's choice of the one alternative and waiver of the other.¹⁰

¹ *Davis v. Walker*, 51 Missis. 659.

² *Prout v. Lomer*, 79 Ill. 331. The ordinary rule is, that one who has two securities for one debt can avail himself of either for the whole. *Taylor's Appeal*, 31 Smith, Pa. 460.

³ *Compton's Case*, cited 1 T. R. 136.

⁴ *Meyer v. Morgan*, 51 Missis. 21; *Hawkins v. Lange*, 22 Minn. 557; *Sentell v. Kennedy*, 29 La. An. 679.

⁵ *Graves v. White*, 87 N. Y. 463; *Dotson v. Bailey*, 76 Ind. 434; *Luey v. Bundy*, 9 N. H. 298; *Fox v. Kitton*, 19 Ill. 519.

⁶ *Lowe v. Peers*, 4 Bur. 2225, 2228.

⁷ *Ante*, § 186; *Tightmeyer v. Mon-*

gold, 20 Kan. 90; *Fanson v. Linsley*, 20 Kan. 235; *National Oil Ref. Co. v. Bush*, 7 Norris, Pa. 335; *Russell v. Bell*, 10 M. & W. 340.

⁸ For example, *Pugh v. Mays*, 60 Texas, 191; *Ohio Falls Car Co. v. Menzies*, 90 Ind. 83.

⁹ *Anderson's Appeal*, 12 Casey, Pa. 476; *Pratt v. Philbrook*, 41 Maine, 132; *Spread v. Morgan*, 11 H. L. Cas. 588; *Sanger v. Wood*, 3 Johns. Ch. 416; *Childs v. Stoddard*, 130 Mass. 110, 112. See *Anderson v. Soward*, 40 Ohio State, 325; *McCracken v. Finley*, Pr. Dec. 2d ed. 195.

¹⁰ *Post*, § 803; *Sanger v. Wood*, 3

§ 784. **Consequences of Election.** — An election once made binds the party, he is now too late to take the other alternative.¹ Thus, if he has sued for the price of goods on the theory that a transaction amounted to a sale of them, he cannot assume there was no sale and so reclaim them.² Or, if one, having an option to buy certain land, enters into possession or otherwise exercises over it acts of ownership, he cannot recede from the purchase, which he has thus elected to make.³

§ 785. **Alternative in Contract — (Which Party elect).** — Coke states the rule, and it has ever since prevailed unquestioned, to be, that, “in case an election be given of two several things, always he which is the first agent, and which ought to do the first act, shall have the election.”⁴ Among his illustrations are the following. “If I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seizure of one of them. . . . But, if I contract with you to pay unto you twenty shillings or a robe at the Feast of Easter [the election is with me to give the one or the other, yet if I neglect to do either], after the Feast [you may elect which you will have, that is] you may bring an action of debt for the one or for the other.”⁵ The latter instance is a familiar one of the election shifting; being in the one party before a breach, and in the other after. This may be further illustrated thus, —

§ 786. **Before or after Breach.** — Where a promise is in the alternative, to pay in money or something else, and the promisor responds in neither on the appointed day, his right of election is gone, and the promisee is entitled to the money.⁶

Johns. Ch. 416; *Allen v. Knowlton*, 47 Vt. 512; *The Charlotte*, Lush. 252; *Wright v. Thomas*, 26 Ohio State, 346; *Melick v. Darling*, 11 Ohio, 343; *Anderson's Appeal*, supra.

¹ *Brown v. Royal Ins. Co.* 1 Ellis & E. 853, 5 Jur. n. s. 1255; *Allen v. Knowlton*, 47 Vt. 512; *Childs v. Stoddard*, 130 Mass. 110; *Brinley v. Tibbets*, 7 Greenl. 70; *Brown v. Bass*, 4 Wal. 262.

² *Bailey v. Hervey*, 135 Mass. 172; *Nelson v. Carrington*, 4 Munf. 332.

³ *Curran v. Rogers*, 35 Mich. 221.

⁴ Co. Lit. 145 a; *Mayer v. Dwinell*, 29 Vt. 298; *Smith v. Sanborn*, 11 Johns. 59; *Disborough v. Neilson*, 3 Johns. Cas. 81; *Choice v. Moseley*, 1 Bailey, 136; *Chippendale v. Thurston*, 4 Car. & P. 98; *Layton v. Pearce*, 1 Doug. 15; *Deverill v. Burnell*, Law Rep. 8 C. P. 475, 480.

⁵ Co. Lit. 145 a.

⁶ *Marlor v. Texas, &c. Railway*, 21 Fed. Rep. 383.

And where the bargain was to pay a widow for her dower "eight hundred dollars, or, in lieu thereof, twenty dollars semi-annually" during her life, it was held that, on the party's failure to pay a twenty dollar instalment, he became liable to be sued for the eight hundred dollars.¹ So, if a debtor has the option to make payment in one of three ways by a certain time, then, if he suffers the time to elapse without paying, the option passes to the creditor, who may enforce which he will.²

§ 787. **Complications** — may arise, wherein the application of the rule we are considering will be less plain. Or the terms of the contract or its nature may furnish the guide in place of the rule. As the facts of cases differ, and the new ones will almost certainly vary from the old, it is believed that the practitioner will be best served by leaving the question here.³

§ 788. **Further Help** — on this subject of election may be derived from the elucidations of its correlative subject; namely, —

II. *Waiver.*

§ 789. **Elsewhere.** — The doctrine of waiver is in some degree elucidated in our chapter on the consideration.⁴

§ 790. **Extent of Doctrine.** — Waiver, equally with its counterpart election,⁵ pervades nearly or absolutely every department of the law and judicial practice, civil and criminal.⁶ In the law of contracts, —

§ 791. **On what Principles.** — The doctrine rests on one, or another, or on all in combination, of the following three principles, as the special facts and nature of the particular case

¹ Waggoner v. Cox, 40 Ohio State, 539.

² Corbin v. Fairbanks, 56 Vt. 538. As affirming the doctrine of this section generally, Collins v. Whigham, 58 Ala. 438.

³ Consult, for example, Fordley's Case, 1 Leon. 68; Mulcahey v. Emigrant Indus. Sav. Bank, 89 N. Y. 435; Price v. Nixon, 5 Taunt. 338; Jones v. Kemp, 49 Mich. 9; Clark v. Dickinson,

74 N. Y. 47; Perry v. Watts, 67 Ga. 602; Dessert v. Scott, 58 Wis. 390; White v. Hancock, 2 C. B. 830; Blitz v. Union Steam Co. 51 Mich. 558; Weston v. Metropolitan Asy. Dist. 9 Q. B. D. 404; Moale v. Baltimore, 61 Md. 224.

⁴ Ante, § 94-100.

⁵ Ante, § 777.

⁶ For expositions, see 1 Bishop Crim. Law, § 995-1007, 1 Bishop Crim. Proced. § 117-126, and various other places.

indicate; namely, the principle of contract by mutual concurrence of the wills, the principle of contract created by law, and the principle of estoppel.

§ 792. **Defined.** — Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward. To illustrate, —

§ 793. **Right under Law — (Statute — Constitution).** — Any right derived from the law may be waived.¹ Thus, the right to be notified of a judicial proceeding, or to be summoned in a particular form, is waived by an unconditional appearance.² An innkeeper waives his lien on the goods of a guest if he wrongfully sells them.³ And where a statute forbids a stockholder to transfer his stock on the books of a bank while indebted to it, the bank may still make the transfer, thereby relinquishing the benefit, and giving the transferee a perfect title.⁴ The right of appeal and all similar rights may be waived.⁵ So may a privilege conferred by the State or National Constitution.⁶ Again, —

§ 794. **Landlord and Tenant — (Forfeiture).** — Where a lease of lands subjects the lessee's estate to forfeiture if he assigns it, or permits an auction on the premises, or neglects to pay rent, or the like, and thereupon the lessee does or suffers the prohibited thing, the lessor will waive the forfeiture, so as never afterward to be permitted to insist upon it, should he take pay for subsequent rent, or do anything else by which in legal effect he recognizes the continued existence of the lease.⁷ So, —

¹ Ante, § 94–98.

² *Christal v. Kelly*, 88 N. Y. 285; *Handy v. Insurance Co.* 37 Ohio State, 366; *Williams v. Kimball*, 132 Mass. 214; *Catlin v. Ricketts*, 91 N. Y. 668.

³ *Mulliner v. Florence*, 3 Q. B. D. 484.

⁴ *National Bank v. Watsontown Bank*, 105 U. S. 217.

⁵ *Ogdensburgh, &c. Railroad v. Ver-*

mont, &c. Railroad, 63 N. Y. 176; *Kirk v. Hamilton*, 102 U. S. 68; *Stryker v. Rivers*, 47 Iowa, 108.

⁶ *Simmons v. Anderson*, 56 Ga. 53; *Lee v. Tillotson*, 24 Wend. 337; *Home Ins. Co. v. Security Ins. Co.* 23 Wis. 171; *Ferguson v. Landram*, 5 Bush, 230; *Tone v. Columbus*, 39 Ohio State, 281.

⁷ *Coon v. Brickett*, 2 N. H. 163;

§ 795. **Time and Manner of Performance.** — A party to a contract may so waive any objection to its performance in time or manner, that, though in fact it has not been in these respects in accord with the stipulations, the mutual rights of the parties will thereafter be the same as though there had been a literal fulfilment.¹ In which case, for example, if the contract is under seal and the waiver is oral, an action of covenant rather than one adapted to a parol undertaking will be proper.² The distinction between this sort of case, and that in which the change will be held to constitute a new contract, is not quite so plainly drawn in the adjudged cases as we might desire; still its existence, in point of legal doctrine, is well established.³ An instance occurs where the time of the doing has been postponed at the other party's request, or by mutual acquiescence, but this operates practically to enlarge the time.⁴ If the contract requires manufactured goods to be inspected by a specified person, but the party receiving them has them inspected by another, such party cannot object to the personality of the inspector.⁵ A person who has bargained to buy of another a safe of a particular description, if he accepts one of another description, nor offers to return it, thereby waives the difference, and he must pay the contract price.⁶ One who, before default by the other party, disables

Western Bank v. Kyle, 6 Gill, 343; *Clark v. Jones*, 1 Denio, 516; *McGlynn v. Moore*, 25 Cal. 384; *McKildoe v. Darracott*, 13 Grat. 278; *Toleman v. Portbury*, Law Rep. 6 Q. B. 245, 248; *Mitchell v. Steward*, Law Rep. 1 Eq. 541; *Grimwood v. Moss*, Law Rep. 7 C. P. 360.

¹ *National Life Ins. Co. v. Tullidge*, 39 Ohio State, 240; *Taylor v. Prestidge*, 33 La. An. 41; *Defenbaugh v. Weaver*, 87 Ill. 132; *Lounsbury v. Beebe*, 46 Conn. 291; *Osborne v. Flood*, 11 Bradw. 408; *Marsh v. Bellew*, 45 Wis. 36; *Bast v. Byrne*, 51 Wis. 531; *Selleck v. Griswold*, 49 Wis. 39.

² *Monocacy Bridge v. American Iron Bridge Manuf. Co.* 2 Norris, Pa. 517.

³ *McCombs v. McKennan*, 2 Watts & S. 216; *Wilhelm v. Caul*, 2 Watts

& S. 26; *Fisher v. Smith*, 48 Ill. 184; *Stead v. Dawber*, 10 A. & E. 57, 64; *McNaughten v. Cassally*, 4 McLean, 530; *Ex parte Booker*, 18 Ark. 338; *Burrill v. Saunders*, 36 Maine, 409; *Vroman v. Darrow*, 40 Ill. 171; *Cuff v. Penn*, 1 M. & S. 21; *Chicago, etc. Railway v. Van Dresar*, 22 Wis. 511; *Adams v. Hill*, 16 Maine, 215; *Palmer v. Stockwell*, 9 Gray, 237; *Shaw v. The Turnpike*, 2 Pa. 454; *Dare v. Spencer*, 5 Blackf. 491.

⁴ *Smith v. Snyder*, 77 Va. 432; *Lawson v. Hogan*, 93 N. Y. 39; *Swift v. United States*, 14 Ct. of Cl. 308.

⁵ *Hobart v. Beers*, 26 Kan. 329.

⁶ *Mackey v. Swartz*, 60 Iowa, 710. And see *Comstock v. Sanger*, 51 Mich. 497; *Hirshhorn v. Stewart*, 49 Iowa, 418. This sort of doctrine does not ap-

himself to perform, thereby waives the doing by such party of acts which, but for the disability, would be conditions precedent to his maintaining a suit on the contract.¹ The waiver may be by acts after, the same as before, default; as, where one acquiesces in the doing to-day of what ought to have been done yesterday.²

§ 796. **The Principle** — on which, in various circumstances, a performance in time or manner differing from the stipulations, which are waived, is accorded the same effect as a literal performance, is evidently that of estoppel.³ A party who, standing by, has concurred in and accepted what the other did in fulfilment, is not in a position to deny that the contract has been fulfilled. To illustrate, —

§ 797. **In Insurance Law.** — A policy of insurance specifies the time and manner of notifying the insurer of a loss, and proving it. But if, after the loss, the proper officer of the insurance company, instead of standing upon his right to have such notification and proof, goes upon the ground and agrees with the insured as to the valuation, the transaction constitutes a waiver, by the company, of the steps set down in the policy.⁴ And so does anything else of a similar sort.⁵ If, where the insurer has thus waived the steps, leaving the insured to believe them not required, the former could insist on being released from payment because they were not taken, he would have misled the latter to his great detriment, — exactly what the doctrine of equitable estoppel was introduced into the law to prevent.⁶ Again, where a policy is by its terms forfeited if a payment is not made in a time or manner pointed out,⁷ the insurer waives the forfeiture if he volunta-

ply to a structure which one has built, not according to contract, on the land of another who, therefore, can do no otherwise than accept it. *Levy v. Schwartz*, 34 La. An. 209.

¹ *Woolner v. Hill*, 93 N. Y. 576, 581.

² Ante, § 794; *Jordan v. Rhodes*, 24 Ga. 478; *Nibbe v. Brauhn*, 24 Ill. 268; *McCord v. West Feliciana Railroad*, 3 La. An. 285; *Lagrange v. Fowler*, 4 La. An. 243; *Fox v. Harding*, 7 Cush. 516;

Lawrence v. Davey, 28 Vt. 264; *Baldwin v. Farnsworth*, 1 Fairf. 414; *Eyster v. Parrott*, 83 Ill. 517.

³ Ante, § 264 et seq.

⁴ *Susquehanna Mut. Fire Ins. Co. v. Staats*, 6 Out. Pa. 529.

⁵ *Pennsylvania Fire Ins. Co. v. Dougherty*, 6 Out. Pa. 568.

⁶ Ante, § 284.

⁷ *Mutual Life Ins. Co. v. French*, 30 Ohio State, 240.

rily accepts payment in another time or manner.¹ Were this not so, the insurer would, in accepting the money or other thing rendered in payment, have misled the insured to his detriment, in violation of the rule in estoppel. Once more, if the insured is to make yearly payments, and the omission of one is to forfeit the policy, but from each payment there is to be a deduction ascertainable by the insurer whose duty it is to notify the insured of the amount, then, should this notice in a particular instance not be given, there can be no forfeiture for the non-payment. It is waived.² In this case, also, if the doctrine of equitable estoppel were not applied, the insurer would have entrapped the insured to his injury.

§ 798. **Other Illustrations** — will be discovered, by the discerning reader, in any of the cases which are cited to the doctrine itself.³

§ 799. **Knowledge** — of the facts is indispensable in waiver, which does not take effect by anything done in ignorance of them.⁴ Thus, —

§ 800. **Breach of Condition.** — By no act does one waive the breach of a condition in his contract, if the fact that it is broken is unknown to him.⁵ And —

§ 801. **Defect in Manufacture.** — If, in an article manufactured under a contract, there is a latent defect, in ignorance whereof the party accepts it, he does not thereby waive his right to recover damages for the defect.⁶ Again, —

§ 802. **Stoppage in Transitu.** — By the law of sales, if, after one has sold goods to another, and while they are in the possession of warehousemen and common carriers, yet not other-

¹ *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Thompson v. Knickerbocker Life Ins. Co.* 104 U. S. 252; *Miller v. Life Ins. Co.* 12 Wal. 285.

² *Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 30.

³ See, for example, cases cited ante, § 794, 795; *Rump v. Schwartz*, 56 Iowa, 611; *Lake v. Lewis*, 16 Nev. 94; *Hill v. Townsend*, 69 Ala. 286; *Jones v. Trinity Parish Vestry*, 19 Fed. Rep. 59.

⁴ Ante, § 783; *Darnley v. London*,

etc. *Railway*, Law Rep. 2 H. L. 43, 57; *Benedict v. Miner*, 58 Ill. 19; *Boynton v. Braley*, 54 Vt. 92. And see *Hopkins v. Briggs*, 41 Mich. 175; *St. Bartholomew v. Wood*, 30 Smith, Pa. 219.

⁵ *Gray v. Blanchard*, 8 Pick. 284, 292; *Robertson v. Metropolitan Life Ins. Co.* 88 N. Y. 541; *Bennecke v. Connecticut Mut. Ins. Co.* 105 U. S. 355.

⁶ *Cassidy v. Le Fevre*, 45 N. Y. 562; *Strawn v. Cogswell*, 28 Ill. 457; *Moulton v. McOwen*, 103 Mass. 587.

wise delivered, the purchaser becomes insolvent, the seller may reclaim and hold them unless the other will pay for them. This is termed stoppage *in transitu*.¹ But the right thus to reclaim them may be waived. So that, for example, should the seller, with full knowledge of the facts, attach them as the property of the buyer, instead of stopping them as *in transitu*, this right is gone.² But if he is ignorant of the fact that their transit has not ended, and by reason thereof takes the like step, he may stop them and decline to press his suit, on the truth coming to his knowledge.³

§ 803. **Act of Waiver.** — The foregoing sections furnish illustrations of the act by which a waiver is constituted. A secret purpose is not enough,⁴ nor is the silence of one who is under no duty to speak;⁵ but there must be language or conduct duly expressing or exemplifying the intent.⁶

§ 804. **Estoppel — Executed — (Consideration).** — We have seen that, to a large extent, the binding effect of waiver proceeds from the doctrine of estoppel,⁷ where no consideration is required.⁸ Moreover, an executed waiver, even though it was in the nature of an ordinary contract and voluntary, follows the rule of other executed contracts, which are good without a consideration;⁹ so that if, in fact, no return for it was made, it was like any other gift, and it cannot be recalled.¹⁰ On these grounds, —

§ 805. **Simultaneous with Performance.** — If, when performance is due, a party called upon refuses to do the substance of the thing required by his contract, yet does not interpose an available objection as to time and manner, he thereby waives the objection, which afterward he is too late to bring

¹ 2 Kent Com. 540; *Inslee v. Lane*, 57 N. H. 454; *Ex parte Rosevear China Clay Co.* 11 Ch. D. 560; *Kendal v. Marshall*, 11 Q. B. D. 356; *Kemp v. Falk*, 7 Ap. Cas. 573, 35 Eng. Rep. 395, and *Moak's* note.

² *Woodruff v. Noyes*, 15 Conn. 335.

³ *Calahan v. Babcock*, 21 Ohio State, 281, 294.

⁴ *West v. Platt*, 127 Mass. 367.

⁵ *Ante*, § 288; *Texas, &c. Railway*

v. Rust, 19 Fed. Rep. 239; *Hamlin v. Sears*, 82 N. Y. 327.

⁶ *Ante*, § 783; *Mattocks v. Young*, 66 Maine, 459; *Hutcheson v. McNutt*, 1 Ohio, 14, 21; *Howard v. Holland Schools*, 50 Mich. 94; *Cohrt v. Kock*, 56 Iowa, 658.

⁷ *Ante*, § 791, 796-798.

⁸ *Ante*, § 283.

⁹ *Ante*, § 80-84.

¹⁰ *Lawrence v. Dole*, 11 Vt. 549.

forward; nor can he claim that the waiver was without consideration.¹ So an acceptance of what one does as under his contract, yet in time and manner differing from its stipulations, and proceeding from no separate consideration, will be good.²

§ 806. **Right given by Law — (Consideration).** — It has already been sufficiently explained, that a party may waive any right which the law offers him,³ and no consideration is necessary to make the waiver binding.⁴ Still, —

§ 807. **Promise to waive — (Consideration — License).** — In cases not within the foregoing principles, an executory promise to waive a stipulation in a contract is, at most, a mere license, which may be withdrawn at pleasure, unless founded on a consideration.⁵

§ 808. *The Doctrine of this Chapter restated.*

Whenever, by law or by contract, a party has laid before him a variety of steps, the taking of one of which excludes another or the rest, he must choose between them. After his choice is made, and by words or by acts expressed in a manner suited to the particular case, he cannot reverse it; he is said to have elected the one step and waived the other. This doctrine presents itself in various aspects under the differing facts of cases, as explained in the foregoing sections. Repetitions do not seem to be here desirable.

¹ Dunlap v. Hunting, 2 Denio, 643; Merritt v. Cotton States Life Ins. Co. 55 Ga. 103; Morgan v. Stearns, 40 Cal. 434; Dresel v. Jordan, 104 Mass. 407; Stover v. Flack, 30 N. Y. 64; Connelly v. Devoe, 37 Conn. 570; Pullman v. Corning, 5 Selden, 93; Corbitt v. Stonemetz, 15 Wis. 170. And see Long Island Ferry v. Terbell, 48 N. Y. 427.

² Ante, § 795, 797; Porter v. Stew-

art, 2 Aikens, 417; Warren v. Mains, 7 Johns. 476; O'Bannon v. Relf, 7 Dana, 320; Lawrence v. Davey, 28 Vt. 264; Haskell v. Blair, 3 Cush. 534.

³ Ante, § 793.

⁴ Ante, § 94-98.

⁵ Dunning v. Mauzy, 49 Ill. 368; Boutwell v. O'Keefe, 32 Barb. 434; Reynolds v. Burlington, &c. Railroad, 11 Neb. 186.

CHAPTER XXX.

RESCISSION OF THE CONTRACT.

§ 809-811. Introduction.

812-822. By Mutual Consent.

823-836. By one Party as of Right.

837-841. Wrongfully by a Party.

842. Doctrine of Chapter restated.

§ 809. **Defined.** — We have already seen, that rescission is the avoiding of a voidable contract.¹ By “voidable” is here meant, not merely a contract voidable in its nature, but any one which under the circumstances may be avoided by the particular means employed.

§ 810. **Elsewhere.** — Under the titles “Fraud” and “Mistake,” this subject is considerably explained,² and it is more or less so in other connections.³ Release, to be treated of in the next chapter, is analogous to rescission.

§ 811. **How Chapter divided.** — We shall consider rescission, I. By Mutual Consent; II. By one Party rightfully, because of Something in the Terms of the Contract or the Conduct of the other; III. Wrongfully, by one Party, the other not consenting.

I. *By Mutual Consent.*

§ 812. **Power and Purpose.** — The unmaking of a contract is within the power which made it, and is equally effectual.⁴

¹ Ante, § 679.

² Ante, § 679-683, 688, 707-713.

³ Ante, § 130, 135, 174, 273, 325-327, 728.

⁴ *Shellenbarger v. Blake*, 67 Ind. 75;

Mills v. Oddy, 1 Gale, 92, 6 Car. & P.

332, 726, 741.

It requires the same concurrence of the wills, nor will anything short suffice.¹

§ 813. **Consideration.** — The mutual release from the old contract is an adequate consideration for the rescission.²

§ 814. **Special Formalities.** — The Statute of Frauds and other like statutes which require certain specified contracts to be in writing, and the rules of the common law which render a seal essential to some others, do not extend to the rescission; therefore, within explanations already given,³ it may be oral.⁴ Hence, —

§ 815. **How Mutually Rescind.** — If the contract is founded in mutual promises, whether verbal or in writing, — or, if in writing, whether the law requires it to be so or not, — the parties can jointly, before anything is done under it, withdraw these promises; and thereby, whether the withdrawal is oral or written, it will be ended.⁵ Or, if it was under seal, they can mutually do the same thing with the same effect, merely adding the destruction of the seal.⁶ So much is plain. But something less or different will not unfrequently suffice, and the facts of cases vary. Thus, —

§ 816. **Implied — (Both in Fault).** — The mutual consent to a rescission need not be by express words, being equally valid if implied.⁷ It is sufficiently implied, for example, where both

¹ *Cooper v. McIlwain*, 58 Ala. 296; *Beach v. Covillard*, 4 Cal. 315; *Natchez Rockcliffe v. Pearce*, 1 Fost. & F. 300; *Heinekey v. Earle*, 8 Ellis & B. 410.

² *Kelly v. Bliss*, 54 Wis. 187. Compare with ante, § 68; *Morrill v. Colehour*, 82 Ill. 618; *Kent v. Reynolds*, 8 Hun, 559.

³ Ante, § 151-153.

⁴ Ante, § 134, 174; *Davis v. Inscoc*, 84 N. C. 396; *Rex v. Wait*, 11 Price, 518; *Dearborn v. Cross*, 7 Cow. 48; *Guthrie v. Thompson*, 1 Oregon, 353.

⁵ *Stead v. Dawber*, 10 A. & E. 57, 65; *Coles v. Trecothick*, 9 Ves. 234, 250; *Forbes v. Smiley*, 56 Maine, 174; *Waugh v. Blevins*, 68 N. C. 167; *Goman v. Salisbury*, 1 Vern. 240; *Gatlin v. Wilcox*, 26 Ark. 309; *Cutler v. Smith*, 43 Vt. 577; *Guthrie v. Thompson*, 1 Oregon, 353; *Ward v. Walton*, 4 Ind. 75;

Beach v. Covillard, 4 Cal. 315; *Natchez v. Minor*, 9 Sm. & M. 544; *Moore v. Shenk*, 3 Barr, 13; *Lauer v. Lee*, 6 Wright, Pa. 165; *Borum v. Garland*, 9 Ala. 452; *Mills v. Riley*, 7 Ind. 137.

⁶ *Matthewson v. Lydiate*, Cro. Eliz. 546; *Cross v. Powel*, Cro. Eliz. 483. See, further, as to annulling a sealed instrument, ante, § 130-138; *McDonald v. Mountain Lake Water Co.* 4 Cal. 335; *Union Bank v. Call*, 5 Fla. 409.

⁷ *Wheeden v. Fiske*, 50 N. H. 125; *Fine v. Rogers*, 15 Misso. 315; *Jones v. Neale*, 2 Pat. & H. 339; *Washabaugh v. Stauffer*, 32 Smith, Pa. 497; *Wehrli v. Rehwooldt*, 107 Ill. 60; *Jewell v. Reddington*, 57 Iowa, 92; *De Bernardy v. Harding*, 8 Exch. 822; *Paul v. Meservey*, 58 Maine, 419.

parties are in default, so that neither can sue the other; or where both discard the contract.¹ The differing cases within this principle are numberless. For further example, —

§ 817. **Notice and Acceptance.** — If, even before the time for performance arrives, a party notifies the other that he shall not be able to perform, such other may, should he so elect, rescind thereupon the contract. The case will then be one, in effect, of rescission by mutual consent.²

§ 818. **Statu Quo — (Reclaiming Consideration).** — A party, to accomplish an adverse rescission, must return to the non-consenting party what will place him *in statu quo*.³ If, under the mutual rescission which we are now considering, the contract rests simply in mutual promises,⁴ the parties are necessarily put by it into their former condition; but, if either has paid to the other anything for the promise in the contract, he is *prima facie* entitled to have or recover it back.⁵ It is otherwise where one means to make to the other a present of such consideration,⁶ or where it is itself the consideration for the rescission. And, from a complication of reasons,⁷ —

§ 819. **Destruction.** — Surrendering to the maker a promissory note, to be destroyed, is as complete a discharge of the liability as a payment of it in money.⁸

§ 820. **Executed.** — A contract which, being executed on both sides, has fully accomplished its mission, is not the subject of rescission; there is nothing to rescind.⁹ A reversal

¹ *Harris v. Bradley*, 9 Ind. 166; *Carter*, 14 Pick. 424; *Lebanon v. Heath*, 47 N. H. 353; *Kelsey v. United States*, 1 Ct. of Cl. 374; *Bales v. Weddle*, 14 Ind. 349; *Harris v. Bradley*, 9 Ind. 166; *Chapman v. Shaw*, 5 Greenl. 59; *Smith v. Lamb*, 26 Ill. 396; *Blood v. Enos*, 12 Vt. 625; *Middleport Woollen Mills v. Titus*, 35 Ohio State, 253; *Giles v. Edwards*, 7 T. R. 181. See *Jones v. Loggins*, 37 Missis. 546.

² *Johnstone v. Milling*, 16 Q. B. D. 460, 467, 470, 471; *Mersey Steel & Iron Co. v. Naylor*, 9 Ap. Cas. 434, 442, 443; *Shaw v. Republic Life Ins. Co.* 69 N. Y. 286.

³ *Ante*, § 679; *post*, § 833; *Hunt v. Silk*, 5 East, 449; *Jarrett v. Morton*, 44 Misso. 275; *Johnson v. Walker*, 25 Ark. 196; *Ellington v. King*, 49 Ill. 449; *Young v. Stevens*, 48 N. H. 133.

⁴ *Ante*, § 76-79, 815.

⁵ *Barber v. Lyon*, 8 Blackf. 215; *Clark v. King*, 2 Car. & P. 286; *Jenkins v. Thompson*, 20 N. H. 457; *Carter v.*

⁶ *Ante*, § 50.

⁷ *Ante*, § 50, 82, 757, 804.

⁸ *Miller v. Tharel*, 75 N. C. 148; *Paxton v. Wood*, 77 N. C. 11. And see *ante*, § 757.

⁹ *Chapman v. Searle*, 3 Pick. 38, 44.

of what was done could be effected only by a new agreement, under the formalities required in any new transaction.¹ For example, —

§ 821. **Cancelling Deed of Land.** — The title to real estate can be transferred only by deed. If, then, a grantee in whom land has vested delivers back his deed to the grantor, or if it is cancelled by mutual consent, the grantor is not thereby re-invested with the ownership; though in some circumstances the transaction may amount to an agreement to reconvey.² The facts of the particular case may vary this conclusion; as, if the deed has not been recorded, a subsequent conveyance from the original grantor to a third person will transmit the title to the latter.³ And there are exceptional States in which, it appears, the surrender of an unrecorded deed will restore the seisin to the grantor.⁴

§ 822. **Performed on one Side — (Broken).** — If the contract has been performed on one side, and only money remains to be paid on the other side, the discharge from this indebtedness can be effected only in the same way as from any other. It is so likewise of a claim for damages resulting from any breach.⁵

II. *By one Party rightfully, because of Something in the Terms of the Contract or the Conduct of the other.*

§ 823. **Original Voidability.** — Where a contract is voidable in its inception, — as, if by its terms one of the parties may

¹ Quincy v. Tilton, 5 Greenl. 277.

² Kearsing v. Kilian, 18 Cal. 491; Lawton v. Gordon, 34 Cal. 36; Parshall v. Shirts, 54 Barb. 99, 104; Linker v. Long, 64 N. C. 296; Holbrook v. Tirrell, 9 Pick. 105; Steel v. Steel, 4 Allen, 417, 422; Van Hook v. Simmons, 25 Texas, Supp. 323; Fawcetts v. Kimmey, 33 Ala. 261; Gimon v. Davis, 36 Ala. 589; Killey v. Wilson, 33 Cal. 690; Jordan v. Pollock, 14 Ga. 145; Wilson v. Hill, 2 Beasley, 143; Raynor v. Wilson, 6 Hill, N. Y. 469; Connelly v. Skelly, 8 Blackf. 320; Morgan v. Elam,

4 Yerg. 375; Graysons v. Richards, 10 Leigh, 57; Parker v. Kane, 4 Wis. 1; Rogers v. Rogers, 53 Wis. 36; Taliaferro v. Rolton, 34 Ark. 503. And see ante, § 758.

³ Holbrook v. Tirrell, supra.

⁴ Sawyer v. Peters, 50 N. H. 143; Tomson v. Ward, 1 N. H. 9; Nason v. Grant, 21 Maine, 160; Parker v. Kane, 22 How. U. S. 1.

⁵ Nesbitt v. McGehee, 26 Ala. 748; Cutler v. Smith, 43 Vt. 577; Palmer v. Green, 6 Conn. 14; Kidder v. Kidder, 9 Casey, Pa. 268.

avoid it,¹ — or, if it is illegal in one only,² — or, if it is oral, yet such as the Statute of Frauds requires to be written,³ — or, if it was procured of one party by the fraud of the other,⁴ — the expositions of preceding chapters show that it may be avoided, or treated as null, by the party in whom is the right. Beyond this, —

§ 824. **Matter Subsequent** — may create a voidability, authorizing rescission. It is this to which our present inquiries chiefly relate. Thus, —

§ 825. **Failure of Consideration.** — If the consideration has failed,⁵ the party who promised on the strength of it may rescind the bargain.⁶ Or, —

§ 826. **Unable to Perform.** — If one of the parties is or becomes unable to do what he had promised,⁷ — as, if he has disposed of the thing, or otherwise disqualified or disabled himself,⁸ — the other is entitled at his election to rescind the contract. And, in general terms, —

§ 827. **Successive Steps — (Breach).** — Ordinarily, and subject to limitations which will appear as we proceed, where a contract requires successive steps to be taken by the respective parties, if, when a step becomes due, the party either in words or by their equivalent in acts declines to take it,⁹ or is unable,¹⁰ while the other is ready and willing to do his part, the latter may rescind the contract. Or, if he chooses, he can sue for the breach. He cannot do both.¹¹

¹ *Fitzpatrick v. Woodruff*, 96 N. Y. 561; *Fitzgerald v. Allen*, 128 Mass. 232; *In re Dames*, 27 Ch. D. 172, 29 Ch. D. 626; *Kuhns v. Gates*, 92 Ind. 66; *Barr v. Van Duyn*, 45 Iowa, 228; *Sanger v. Chicago*, 65 Ill. 506.

² *Ante*, § 481, 482, 489; *Lafferty v. Jelley*, 22 Ind. 471.

³ *Davis v. Townsend*, 10 Barb. 333.

⁴ *Ante*, § 679–681.

⁵ *Ante*, § 70, 71, 599.

⁶ *Robinson v. Bright*, 3 Met. Ky. 30; *Bonner v. Herrick*, 3 Out. Pa. 220; *Winfrey v. Drake*, 4 Lea, 293.

⁷ *Benson v. Cowell*, 52 Iowa, 137; *Dougherty v. Central Nat. Bank*, 12 Norris, Pa. 227.

⁸ *Pratt v. Philbrook*, 41 Maine, 132; *Miller v. Phillips*, 7 Casey, Pa. 218; *In re Phoenix Bessemer Steel Co.*, 4 Ch. D. 108; *Keys v. Harwood*, 2 C. B. 905.

⁹ *Bloomer v. Bernstein*, Law Rep. 9 C. P. 588; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Morgan v. Bain*, Law Rep. 10 C. P. 15; *Suber v. Pullin*, 1 S. C. 273; *Anderson v. Haskell*, 45 Iowa, 45.

¹⁰ *Ante*, § 826; *Shaffner v. Killian*, 7 Bradw. 620.

¹¹ *Coddington v. Paleologo*, Law Rep. 2 Ex. 193; *Boults v. Mitchell*, 3 Harris, Pa. 371; *Powell v. Sammons*, 31 Ala. 552; *Dodge v. Greeley*, 31 Maine, 343; *Rogers v. Hanson*, 35 Iowa, 283; *Crom-*

§ 828. **Nature of Required Breach.** — Not every shortcoming of a party will authorize the other to rescind.¹ The nature of the particular case must be considered, and it is probably impossible to state a rule applicable to all the varying facts.² In an English case, Littledale, J. set it down as settled “that, if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages,” there cannot be a rescission.³ In some other English cases, “the true question” has been said to be, “whether the acts and conduct of the party” against whom the rescission is undertaken “evinced an intention no longer to be bound by the contract.”⁴ While each of these rules is justly to be applied in the circumstances for which it was meant, there are others in which its attempted application could only mislead. If one fails to perform the condition of his contract,⁵ or if one does not sign written terms pursuant to an oral agreement which is to be reduced to writing;⁶ or if, as stated in the last section, he declines to take a step in a contract providing for alternate steps by the respective parties; or, *a fortiori*, if he disqualifies himself to perform,⁷ — plainly the other party may treat the contract as rescinded. And, in general terms, the doctrine is, that the breach, to justify a rescission, must be of a dependent covenant, or wilful, or in a substantial part comprehending the root of the whole. Nor does it always or necessarily suffice that it will sustain an action for damages.⁸

well v. Wilkinson, 18 Ind. 365; Goodrich v. Laffin, 1 Pick. 57; Pierce v. Duncan, 2 Fost. N. H. 18; Mansfield v. Trigg, 113 Mass. 350; Cohrt v. Kock, 56 Iowa, 658; Rowe v. Rowe, 5 Bradw. 331; Brewer v. Broadwood, 22 Ch. D. 105; Ward v. Kadel, 38 Ark. 174.

¹ Weintz v. Hafner, 78 Ill. 27.

² Mersey Steel, &c. Co. v. Naylor, 9 Q. B. D. 648, 657.

³ Franklin v. Miller, 4 A. & E. 599, 605. And see Scott v. Kittanning Coal Co. 8 Norris, Pa. 231; Waco Tap Railroad v. Shirley, 45 Texas, 355; Hatton v. Johnson, 2 Norris, Pa. 219; Cox v. McLaughlin, 52 Cal. 590.

⁴ Freeth v. Burr, Law Rep. 9 C. P. 208, 213; Mersey Steel, &c. Co. v. Naylor, supra. And see Stephens v. Wilkinson, 2 B. & Ad. 320; Cox v. McLaughlin, 54 Cal. 605.

⁵ Anderson v. Haskell, 45 Iowa, 45; Reed v. Golden, 26 Kan. 500.

⁶ Gullich v. Alford, 61 Missis. 224.

⁷ Ante, § 826; Warren v. Richmond, 53 Ill. 52; Little v. Thurston, 58 Maine, 86.

⁸ Wright v. Haskell, 45 Maine, 489; Miller v. Phillips, 7 Casey, Pa. 218; Fletcher v. Cole, 23 Vt. 114; Gatlin v. Wilcox, 26 Ark. 309; Selby v. Hutchinson, 4 Gilman, 319; Dodge v. Greeley,

§ 829. **Affirmance.** — Within the doctrine of election and waiver, already explained,¹ one cannot rescind a contract which, with knowledge that it has been broken, he has affirmed by doing anything in recognition of its continued existence.²

§ 830. **How rescind — (Equity).** — In cases within the equity jurisdiction, — in most of which, not all, the party has a sort of concurrent remedy at law, — he can apply to equity for a decree of rescission or cancellation.³ And as, while seeking equity he must do equity, and the forms of equity procedure are flexible, the court will adjust the rights of the parties to the equities of the particular case.⁴ Commonly it is not necessary to resort to this method, and the rescission is simply —

§ 831. **At Law.** — The rescission at law does not require a judgment of rescission or cancellation. It would not accord with the course of procedure in the common-law courts. It may be —

§ 832. **By Notice — (Otherwise — Time).** — Ordinarily, as rescission is a matter of election and waiver,⁵ the party against

31 Maine, 343; *Webster v. Enfield*, 5 Gilman, 298; *Reid v. Davis*, 4 Ala. 83; *Simpson v. Crippin*, Law Rep. 8 Q. B. 14; *Luey v. Bundy*, 9 N. H. 298; *Allen v. Webb*, 4 Fost. N. H. 278; *Preble v. Bottom*, 27 Vt. 249; *Townsend v. Hurst*, 37 Missis. 679; *Hime v. Klasey*, 9 Bradw. 190; *Seipel v. International Life Ins. & Co.* 3 Norris, Pa. 47; *United States v. Wormer*, 13 Wal. 25; *Honck v. Muller*, 7 Q. B. D. 92; *Hall v. Stewart*, 58 Iowa, 681.

¹ Ante, § 782-784, 792, 799, 803, 806.

² *Grymes v. Sanders*, 93 U. S. 55; *Brinley v. Tibbets*, 7 Greenl. 70; *Pratt v. Philbrook*, 41 Maine, 132; *Akerly v. Vilas*, 21 Wis. 88; *Fitzpatrick v. Woodruff*, 96 N. Y. 561; *Edwards v. Handley*, *Hardin*, 611; *Crane v. Kildorf*, 91 Ill. 567; *Wilson v. Irish*, 62 Iowa, 260. See *Kuhns v. Gates*, 92 Ind. 66.

³ Ante, § 688, 690, 707, 726, 732, 741, 742; 1 Story Eq. § 692-706 a; *Brooks v.*

Stolley, 3 McLean, 523; *Bogie v. Bogie*, 41 Wis. 209; *Hanna v. Rayburn*, 84 Ill. 533; *Papin v. Goodrich*, 103 Ill. 86; *Smith v. Smith*, 5 Lea, 250; *Blight v. Banks*, 6 T. B. Monr. 192; *Bradbury v. Keas*, 5 J. J. Mar. 446; *Garrett v. Mississippi, &c. Railroad*, *Freeman*, Missis. 70; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Mahon v. Columbus*, 58 Missis. 310; *Lewis v. Tobias*, 10 Cal. 574; *Braimard v. Holsaple*, 4 Greene, Iowa, 485; *Bellows v. Cheek*, 20 Ark. 424; *Field v. Holbrook*, 6 Duer, 597; *Bedford v. Brady*, 10 Yerg. 350; *McClellan v. Coffin*, 93 Ind. 456; *Blake v. Blake*, 56 Wis. 392; *Delong v. Delong*, 56 Wis. 514.

⁴ Ante, § 688; *Williams v. Wilson*, 1 Dana, 157; *Martin v. Broadus*, *Freeman*, Missis. 35; *Ellis v. Ellis*, 1 Dev. Eq. 398; *Waters v. Lemmon*, 4 Ohio, 229; *Callender v. Colegrove*, 17 Conn. 1; *Wood v. Garland*, 58 N. H. 154.

⁵ Ante, § 777 et seq.

whom it takes place should be either notified or otherwise made aware of the intention to rescind.¹ And if a notice on Sunday violates the statute for the observance of the Lord's day, it is ill;² if not, it is good.³ Under many circumstances, perhaps generally, the notice need not be express; for example, the commencement of judicial proceedings, such as a suit to recover back the consideration money, may suffice.⁴ And the rescission must be with reasonable promptness, but this will vary with the particular facts.⁵ Where the contract itself provides the method for its rescission, it simply should be followed.⁶ Moreover, —

§ 833. **Statu Quo.** — The party rescinding must return the consideration or whatever else he received under the contract, and otherwise do what will put him and the other party *in statu quo*, as already explained;⁷ and, if he cannot do this, — as, if he has derived from the contract some benefit, not of a sort to be refunded, — he cannot rescind.⁸ Likewise, —

§ 834. **Recover back.** — Where rescinding is permissible, and it has been lawfully made by the party not in fault, — or, unlawfully by the other party, — the one entitled may recover back the consideration, or whatever else he has paid on the contract; including compensation for work done, goods delivered, and the like, prior to the rescission.⁹ But —

¹ Ante, § 681, 783, 803; Henderson v. Hicks, 58 Cal. 364; Carney v. Newberry, 24 Ill. 203; Mullin v. Bloomer, 11 Iowa, 360; Parmlee v. Adolph, 28 Ohio State, 10.

² Merritt v. Robinson, 35 Ark. 483; Benedict v. Bachelder, 24 Mich. 425.

³ Pence v. Langdon, 99 U. S. 578.

⁴ Ante, § 681; Moore v. Rogers, 19 Ill. 347; Howard v. Hunt, 57 N. H. 467; Graham v. Holloway, 44 Ill. 385.

⁵ Ante, § 680; Cummins v. Lods, 1 McCrary, 338; Michigan, &c. Railroad v. Dunham, 30 Mich. 128; Carney v. Newberry, supra; Grymes v. Sanders, 93 U. S. 55; Bruce v. Davenport, 1 Abb. Ap. 233; Memphis, &c. Railroad v. Neighbors, 51 Missis. 412.

⁶ Davis v. Parish, Litt. Sel. Cas. 153; McKay v. Carrington, 1 McLean, 50.

⁷ Ante, § 679; California Steam Nav. Co. v. Wright, 8 Cal. 585; Jennings v. Gage, 13 Ill. 610; Tisdale v. Buckmore, 33 Maine, 461; Conner v. Henderson, 15 Mass. 319; Brown v. Witter, 10 Ohio, 142; Croft v. Wilbar, 7 Allen, 248; Mason v. Lawing, 10 Lea, 264; Blake v. Nelson, 29 La. An. 245; Smithson v. Inman, 2 Baxter, 88; Axtel v. Chase, 77 Ind. 74; McMichael v. Kilmer, 76 N. Y. 36; Vance v. Schroyer, 79 Ind. 380; Spencer v. St. Clair, 57 N. H. 9; Haase v. Mitchell, 58 Ind. 213.

⁸ Barber v. Lyon, 8 Blackf. 215; Barnett v. Stanton, 2 Ala. 181; Desha v. Robinson, 17 Ark. 228; Moore v. Bare, 11 Iowa, 198; Burge v. Cedar Rapids, &c. Railroad, 32 Iowa, 101.

⁹ Ante, § 682; Brown v. Mahurin, 39 N. H. 156; Drew v. Claggett, 39

§ 835. **Party in Fault.** — One abandoning his contract without justification,¹ or for whose fault the other party has lawfully rescinded it, stands in a different position. Strictly he can recover nothing, because himself in the wrong. Yet, in exceptional circumstances, this rule may be overcome by the equities of the particular case. As to which, the adjudications are in a measure conflicting; and the practitioner should carefully examine those of his own State, and proceed with caution.²

§ 836. **All or none.** — An adverse rescission cannot be for a part of a contract, while the rest is affirmed. It must be for all or none.³ But by mutual consent it may be otherwise.⁴

III. *Wrongfully, by One Party, the other not consenting.*

§ 837. **The Power.** — The limited jurisdiction of the equity tribunals to enforce specific performance of certain contracts constitutes a partial exception to the doctrines of this sub-

N. H. 431; *Sherburne v. Fuller*, 5 Mass. 133, 139; *Kidder v. Hunt*, 1 Pick. 328; *Crossgrove v. Himmelrich*, 4 Smith, Pa. 203; *Fitch v. Casey*, 2 Greene, Iowa, 300; *Dill v. Wareham*, 7 Met. 438; *Randlet v. Herren*, 20 N. H. 102; *Nash v. Towne*, 5 Wal. 689; *Weatherly v. Higgins*, 6 Ind. 73; *Hickock v. Hoyt*, 33 Conn. 553; *Earle v. Bickford*, 6 Allen, 549; *Byers v. Bostwick*, 2 Mill, 74; *Kimball v. Cunningham*, 4 Mass. 502; *Dubois v. Delaware, &c. Canal*, 4 Wend. 285; *Barickman v. Kuykendall*, 6 Blackf. 21; *Butts v. Huntley*, 1 Scam. 410; *Chamberlin v. Scott*, 33 Vt. 80; *Canada v. Canada*, 6 Cush 15; *Feay v. Decamp*, 15 S. & R. 227; *Martin v. Eames*, 26 Vt. 476; *Bayliss v. Pricture*, 24 Wis. 651; *Wilkie v. Womble*, 90 N. C. 254; *Fitzgerald v. Allen*, 128 Mass. 232; *Warren v. Tyler*, 81 Ill. 15.

¹ *Haslack v. Mayers*, 2 Dutcher, 284; *Plummer v. Bucknam*, 55 Maine, 105; *Wooten v. Read*, 2 Sm. & M. 585; *Olmstead v. Beale*, 19 Pick. 528; *Rounds v. Baxter*, 4 Greenl. 454; *Faxon v. Mansfield*, 2 Mass. 147; *Ketchum v. Evertson*,

13 Johns. 359, 365; *Clark v. School District*, 29 Vt. 217; *Larkin v. Buck*, 11 Ohio State, 561; *Robinson v. Raynor*, 28 N. Y. 494.

² *Cardell v. Bridge*, 9 Allen, 355; *Bee Printing Co. v. Hichborn*, 4 Allen, 63; *Hariston v. Sale*, 6 Sm. & M. 634; *Clayton v. Blake*, 4 Ire. 497; *Britton v. Turner*, 6 N. H. 481; *Downey v. Burke*, 23 Misso. 228; *Carroll v. Welch*, 26 Texas, 147; *Pixler v. Nichols*, 8 Iowa, 106; *Patrick v. Putnam*, 27 Vt. 759; *Cahill v. Patterson*, 30 Vt. 592; *Veazie v. Hosmer*, 11 Gray, 396; *Hartwell v. Jewett*, 9 N. H. 249; *Byerlee v. Mendel*, 39 Iowa, 382; *Goodwin v. Merrill*, 13 Wis. 658; *Wade v. Haycock*, 1 Casey, Pa. 382; *Lomax v. Bailey*, 7 Blackf. 599.

³ *Ante*, § 679; *Wolf v. Dietzsch*, 75 Ill. 205; *Converse v. Harzfeldt*, 11 Bradw. 173; *Kimball v. Lincoln*, 7 Bradw. 470; *Wolcott v. Heath*, 78 Ill. 433; *Raymond v. Bearnard*, 12 Johns. 274.

⁴ *Borum v. Garland*, 9 Ala. 452.

title.¹ There appears to be nothing analogous at law.² And the proposition is sound in principle, and sufficiently supported by authority, though more or less may be found in the books against it, that one party alone, with no consent from the other, who is in no fault, has, at law, the power — not to be exercised without liability for damages, but still the power — to rescind any executory contract. If this were not so, one might be ruined by an undertaking the carrying out of which a change in circumstances rendered highly inexpedient or practically impossible.³ Thus, —

§ 838. **Services for specified Time.** — If one employs another for an agreed period, but turns him off before it has expired, the latter may recover damages for this breach of contract,⁴ — or, accepting the unauthorized rescission, for what the work is worth,⁵ — yet he cannot lie by and refuse other employment, and compel payment as though the full services were rendered.⁶ Nor, on an allegation of work done, can he enforce payment for work contracted for, which the defendant would not suffer him to do.⁷ Again, —

§ 839. **Work on Personalty.** — If one delivers an article of

¹ 1 Story Eq. § 712-793.

² Clark v. Marsiglia, 1 Denio, 317; Lord v. Thomas, 64 N. Y. 107, 110.

³ See cases cited to the next four sections; also Clark v. Marsiglia, supra; New Orleans v. Church of St. Louis, 11 La. An. 244.

⁴ Nations v. Cudd, 22 Texas, 550; Fowler v. Armour, 24 Ala. 194; Davis v. Ayres, 9 Ala. 292; Miller v. Goddard, 34 Maine, 102; East Tennessee, &c. Railroad v. Staub, 7 Lea, 397.

⁵ Sherman v. Champlain Transp. Co. 31 Vt. 162; Britt v. Hays, 21 Ga. 157; Rogers v. Parham, 8 Ga. 190; Carroll v. Giddings, 58 N. H. 333; Clark v. Manchester, 51 N. H. 594; Harris v. Separks, 71 N. C. 372; Ralston v. Kohl, 30 Ohio State, 92. And see Moulton v. Trask, 9 Met. 577.

⁶ Ricks v. Yates, 5 Ind. 115; Prichard v. Martin, 27 Missis. 305; Sherman v. Champlain Transp. Co. supra; Walworth v. Pool, 4 Eng. 394; King v.

Steiren, 8 Wright, Pa. 99; Jones v. Jones, 2 Swan, Tenn. 605; Costigan v. Mohawk, &c. Railroad, 2 Denio, 609; McDaniel v. Parks, 19 Ark. 671; Children of Israel v. Peres, 2 Coldw. 620; Holloway v. Talbot, 70 Ala. 389; Howard v. Daly, 61 N. Y. 362; Chamberlin v. Morgan, 18 Smith, Pa. 168; Barker v. Knickerbocker, &c. Ins. Co. 24 Wis. 630. This I understand to be established doctrine, yet it is not recognized in all the cases. See, on this question, besides the above cases, Bradshaw v. Branan, 5 Rich. 465; Cox v. Adams, 1 Nott & McC. 284; Webster v. Wade, 19 Cal. 291; Britt v. Hays, 21 Ga. 157; Colburn v. Woodworth, 31 Barb. 381; Byrd v. Boyd, 4 McCord, 246; Fuller v. Little, 61 Ill. 21; Isaacs v. Davies, 68 Ga. 169.

⁷ Moore v. Nason, 48 Mich. 300; Weed v. Burt, 78 N. Y. 191. See Mitchell v. Scott, 41 Mich. 108.

personal property — for example, a painting — to another, who undertakes to do certain specified work upon it, he is still entitled, even after it has been commenced, to countermand the order, in violation of his contract, yet under liability for damages; so that, should the other persist in doing what he had agreed, and do it, he cannot recover compensation therefor.¹ In this case, it is perceived, the party against whom the rescission is wrongfully made, being in possession of the article, has the manual power to carry out the contract; yet the law does not permit him. *A fortiori*, —

§ 840. **Work on Realty.** — One, after contracting to do something to the real estate of another, who as possessor has the right to order him away, and after the latter's wrongful rescission, cannot effectually perform. For example, if the bargain is to put in a gas generator, then the party employing forbids, the other is not entitled to go on with the steps in his power, and sue as on a completed contract. His remedy is simply to recover what he has suffered from not being permitted to fulfil.² In these cases, —

§ 841. **Duty of Party not in Fault.** — A party who receives from the other a notice of rescission is, while entitled to damages should it proceed from the other's mere pleasure or necessities, still not justifiable in allowing anything further to be done to bring needless expense. He is even to take affirmative action, if the interests growing out of the rescinded contract require.³

§ 842. *The Doctrine of this Chapter restated.*

By mutual consent, persons who have made a contract can unmake it; but one, without the concurrence of the other,

¹ *Clark v. Marsiglia*, 1 Denio, 317. The opinion in this case is brief; it cites no authorities, but in legal argumentation it is conclusive. And see *Park v. Kitchen*, 1 Misso. Ap. 357; *Zuck v. McClure*, 2 Out. Pa. 541; *Eckenrode v. Canton Chemical Co.* 55 Md. 51; *Lord v. Thomas*, 64 N. Y. 107; *Smith v. O'Donnell*, 8 Lea, 468.

² *Butler v. Butler*, 77 N. Y. 472. And see *New England Iron Co. v. Gilbert Elev. Railroad*, 91 N. Y. 153; *Marsh v. McPherson*, 105 U. S. 709; *Smith v. Wheeler*, 7 Oregon, 49.

³ *Dillon v. Anderson*, 43 N. Y. 231; *Strauss v. Meertief*, 64 Ala. 299, 307, 308; *Chamberlin v. Morgan*, 18 Smith, Pa. 168.

cannot undo what it required two to do. Still one alone can break a contract, by becoming disqualified to perform it, or by refusing. And, though some of the cases seem to hold that, after such refusal or disqualification, and even after notice to the other party that the contract will not be performed, the latter may elect to treat it as continuing, this is contrary to sound reason, to natural justice, and the better adjudications. At law, a party who has broken his agreement will be liable to the other to the extent of what has been suffered, and no more. In equity, there are circumstances in which a specific performance may properly be, and is, enforced.

After a contract has been broken, whether by an inability to perform it, by a rescinding against right, or otherwise, the party not in fault may sue the other for the damages suffered; or, if the parties can be placed *in statu quo*, he may, should he prefer, return what he has received, and recover in a suit the value of what he has paid or done. The pursuing of the latter alternative is called rescission.

CHAPTER XXXI.

RATIFICATION OR AFFIRMANCE OF THE CONTRACT AND
RELEASE THEREFROM.

§ 843. Introduction.

844-849. Ratification or Affirmance.

850-857. Release by Oral or Written Words.

858-866. Release by Death.

867-878. Otherwise by Operation of Law.

879. Doctrine of Chapter restated.

§ 843. **How Chapter divided.** — We shall consider, I. The Ratification or Affirmance of the Contract ; II. Release from the Contract by Oral or Written Words ; III. Release from the Contract by Death ; IV. Release otherwise by Operation of Law.

I. *The Ratification or Affirmance of the Contract.*

§ 844. **Nature of Doctrine** — (**Election and Waiver**). — The doctrine of ratification is a branch of that of election and waiver, treated of in a preceding chapter.¹ It may be stated to be that, since one who is entitled to choose between alternative steps is bound by his election when he has duly signified it, if a party who may either repudiate or affirm a contract ratifies it by a sufficiently significant act,² he cannot afterward recede.³

§ 845. **Here — Elsewhere.** — It is proposed in this sub-title simply to take a condensed, general view of the subject. We have seen something of it in our examinations of fraud,⁴ and

¹ Ante, § 777 et seq.124 ; *Skinner v. Dayton*, 19 Johns. 513,² *Doughaday v. Crowell*, 3 Stock. 542, 554.201 ; *Dodge v. Lambert*, 2 Bosw. 570.⁴ Ante, § 683.³ *Walter v. James*, Law Rep. 6 Ex.

in other connections.¹ It will likewise come before us, further on, at places referred to in the note.²

§ 846. **Voidable — Void.** — Strictly, only a voidable contract admits of ratification, a void one does not.³ But we have seen that, by an act analogous to ratification, a new and valid contract may, where there is a consideration for it, be made in substitution of one which was void.⁴ So, —

§ 847. **Estoppel — (Forgery).** — Though a forged contract is void, if the injured party acknowledges its genuineness under circumstances which require him to speak truly,⁵ he will thereupon be estopped to contest its validity; so that practically this will amount to an affirmance.⁶ But in a case not within the rule of estoppel, and not evolving a new contract,⁷ there can be no ratification, — a proposition sound in principle and sustained by the better authorities,⁸ yet not quite unanimously.⁹ Again, —

§ 848. **Capacity to ratify — (Knowledge).** — Only a party having the capacity to make the contract as an original one can ratify it.¹⁰ Nor can there be a ratification except with knowledge of the facts.¹¹

§ 849. **Effect.** — As between the parties, and subject to intervening rights of third persons, and possibly also to some

¹ Ante, § 286, 542, 614, 620, 679.

² Post, § 936–945, 974, 975, 986, 995, 1091–1110, 1225, 1226.

³ Ante, § 542, 614, 620; *Workman v. Wright*, 33 Ohio State, 405; *Pearsoll v. Chapin*, 8 Wright, Pa. 9; *Brook v. Hook*, Law Rep. 6 Ex. 89, 99; *Matthews v. Baxter*, Law Rep. 8 Ex. 132; *Day v. McAllister*, 15 Gray, 433. This proposition is axiomatic; and, though sustained by the authorities, it does not require them. For the assertion that a contract is susceptible of ratification only particularizes how it is voidable, not void; in other words, has some effect. Ante, § 611, 617, 620.

⁴ Ante, § 542; *Decuir v. Lejeune*, 15 La. An. 569.

⁵ Ante, § 288, 290, 291, 294, 295.

⁶ Ante, § 295; *Rudd v. Matthews*,

79 Ky. 479; *Cohen v. Teller*, 12 Norris, Pa. 123.

⁷ Ante, § 846.

⁸ *Workman v. Wright*, 33 Ohio State, 405; *Brook v. Hook*, Law Rep. 6 Ex. 89; *McHugh v. Schuykill*, 17 Smith, Pa. 391.

⁹ *Greenfield Bank v. Crafts*, 4 Allen, 447.

¹⁰ *In re Empress Eng'g Co.* 16 Ch. D. 125, 128, 130; *Kelner v. Baxter*, Law Rep. 2 C. P. 174, 185; *Cook v. Tullis*, 18 Wal. 332; *McCracken v. San Francisco*, 16 Cal. 591.

¹¹ Ante, § 783, 799; *Savery v. King*, 5 H. L. Cas. 627; *Billings v. Morrow*, 7 Cal. 171; *Ætna Ins. Co. v. North W. Iron Co.* 21 Wis. 458; *Owings v. Hull*, 9 Pet. 607, 629; *Seymour v. Wyckoff*, 6 Selden, 213.

other qualifications, the effect of the ratification is retrospective, making the contract good from the beginning.¹

II. *Release from the Contract by Oral or Written Words.*

§ 850. **Meanings of Term.** — The word “release” is variable in meaning. In some connections, it denotes a form of conveyance;² being, says Blackstone, “a discharge or conveyance of a man’s right in lands or tenements, to another that hath some former estate in possession.”³ It is likewise employed to signify the surrender, in any manner, of any claim or right.⁴ And there may be release as well by operation of law as by express words.⁵ Between these extremes there are various intermediate meanings.

§ 851. **Seal — Consideration.** — It has already been explained that either the release must be under seal, which imports a consideration,⁶ or there must be for it a consideration in fact. And the nature of such consideration has been pointed out.⁷ Intimations or rulings, occasionally met with in the books, that there can be no release except under seal,⁸ are equally void of foundation in principle and contrary to the prevailing course of adjudication.⁹ Beyond this, —

§ 852. **Adaptability — Grade.** — In the older books, and sometimes in the later, we find such intimations as that “the defeasance,” whether by release or otherwise, “must be by matter as high as the instrument to be defeated;”¹⁰ so that, for example, an obligation created by deed can be released

¹ *Ancona v. Marks*, 7 H. & N. 686, 8 Jur. n. s. 516; *Cook v. Tullis*, 18 Wal. 332; *Waller v. Logan*, 5 B. Monr. 515.

² *Hall v. Ashby*, 9 Ohio, 96.

³ 2 Bl. Com. 324.

⁴ Co. Lit. 264, 292; *Hall v. Kirby*, 2 Dy. 217 b; *Hancock v. Field*, Cro. Jac. 170; *Carthage v. Manby*, 2 Show. 90. “A release is when a man quits or renounces that which he before had.” Com. Dig. Release, A, 1.

⁵ Co. Lit. 264 b; 2 Chit. Con. 11th Am. ed. 1145.

⁶ Ante, § 119; *Lowe v. Weatherley*, 4 Dev. & Bat. 212; *Union Bank v. Call*, 5 Fla. 409.

⁷ Ante, § 50-55; *Miller v. Hemler*, 5 Watts & S. 486; *Kidder v. Kidder*, 9 Casey, Pa. 268.

⁸ 2 Chit. Con. 11th Am. ed. 1145; *Rowley v. Stoddard*, 7 Johns. 207; *De Zeng v. Bailey*, 9 Wend. 336; *Dillingham v. Estill*, 3 Dana, 21; *Davis v. Bowker*, 1 Nev. 487.

⁹ See further, post, § 874.

¹⁰ 2 Saund. Wms. ed. 47 ff, note.

only by an instrument under seal. But we have seen that the contrary is now the prevailing doctrine; and an oral discharge of a specialty, if on a valid consideration, is effectual.¹ The principle is, that words, not in writing, and not under seal, are, where there is a consideration for them, of the same force as written and even sealed words, unless there is some technical rule to the contrary;² and there is no ground for a technical rule requiring a seal in discharge of a sealed instrument. A specialty, equally with a simple contract, contemplates performance without seal; and the payment of a consideration for a release is a species of fulfilment, within the principle that what is accepted as such is the same as the actual doing.³ So, for the like reason, a contract which a statute requires to be in writing can be orally released.⁴ Still, —

§ 853. **Release as a Conveyance.** — Since there can be no conveyance of land except by deed,⁵ a release, to operate as such conveyance, must be under seal.⁶ Again, —

§ 854. **Release of Record.** — The doctrine that judgments, recognizances, and other debts of record may be released by an instrument under seal⁷ is perhaps truly limited, as already said,⁸ to the sealed release. But there is believed to be just ground to question this proposition.⁹

§ 855. **Existing Debt or Right.** — A release can operate only upon what has some actual or potential existence.¹⁰ But it will bar a present interest, though to take effect in the future;¹¹ as, a debt not yet due.¹²

¹ Ante, § 130, 132, 134. And see ante, § 772-774.

² Ante, § 153.

³ Ante, § 795-797.

⁴ Ante, § 174, 771; *Goss v. Nugent*, 5 B. & Ad. 58, 65, 66; *Cummings v. Arnold*, 3 Met. 486; *Stearns v. Hall*, 9 Cush. 31.

⁵ Ante, § 821; post, § 1327, 1331.

⁶ Co. Lit. 264 b; *Leviston v. Junction Railroad*, 7 Ind. 597; *Benjamin v. McConnell*, 4 Gilman, 536.

⁷ Ante, § 146; *Barker v. St. Quintin*, 12 M. & W. 441.

⁸ Ante, § 146.

⁹ *Brackett v. Winslow*, 17 Mass. 153,

159; *Barker v. St. Quintin*, 12 M. & W. 441; *Brown v. Feeter*, 7 Wend. 301; *Collier v. Field*, 1 Montana, 612; *Davis v. Barkley*, 1 Bailey, 140.

¹⁰ *Baker v. Heard*, 5 Exch. 959; *Drage v. Netter*, 1 Ld. Raym. 65; *Ashton v. Freestun*, 2 Man. & G. 1; *Hartley v. Manton*, 5 Q. B. 247; *Carstairs v. Rolleston*, 5 Taunt. 551; *Porter v. Perkins*, 5 Mass. 233; *Pierce v. Parker*, 4 Met. 80; *Lacy v. Kinnaston*, 3 Salk. 298.

¹¹ *Woods v. Williams*, 9 Johns. 123, 125.

¹² *Deland v. Amesbury, &c. Manuf. Co.* 7 Pick. 244; *Hoe's Case*, 5 Co. 70 b.

§ 856. **How interpret.** — The books abound in rules for its interpretation, and in meanings given by the courts to particular words in it. But the general rules of construction already stated¹ will for most instances suffice. The intent of the parties should be carefully searched for and followed:² as, for example, its effect should be kept within their particular purpose;³ or, as expressed by a learned judge, it should be “limited always to that thing or those things which were specially in the contemplation of the parties.”⁴ One of the consequences of which is, that a claim whereof they were ignorant will not be cut off by the release.⁵ Another is, that words of release will be made to operate as a grant, when otherwise the intent would fail.⁶

§ 857. **Not to Sue.** — A covenant perpetual not to sue the releasee is a *quasi* release, operative between the parties, — a construction made to “avoid circuity of action.”⁷ But the courts have taken the distinction, that such covenant limited in time will not thus bar the suit.⁸ More of this will appear under our fourth sub-title.⁹

III. *Release from the Contract by Death.*

§ 858. **No contracting after.** — A dead person cannot enter into a contract.¹⁰ For example, a deed to him conveys nothing.¹¹ Again, —

¹ Ante, § 365 et seq.

² Ante, § 380; *Rich v. Lord*, 18 Pick. 322, 325.

³ *Seymour v. Butler*, 8 Iowa, 304; *Payler v. Homersham*, 4 M. & S. 423.

⁴ *Lord Westbury* in *London, &c. Railway v. Blackmore*, Law Rep. 4 H. L. 610, 623.

⁵ *Turner v. Turner*, 14 Ch. D. 829. See *Hyde v. Baldwin*, 17 Pick. 303, 307; *Pierson v. Hooker*, 3 Johns. 68, 70. Of course, if the form of the expression indicates the intent to discharge such a claim should any be discovered, it will be given that effect.

⁶ *Hastings v. Blue Hill Turnpike*, 9

Pick. 80; *Edwards v. Bailey*, Cowp. 597, 600. Compare with ante, § 391, 395.

⁷ *Cuyler v. Cuyler*, 2 Johns. 186; *Harrison v. Close*, 2 Johns. 448; *Rosevelt v. Stackhouse*, 1 Cow. 122, 126; *Marietta Sav. Bank v. Janes*, 66 Ga. 286; *Ford v. Beech*, 11 Q. B. 852, 871; *Walker v. McCulloch*, 4 Greenl. 421; *Harvey v. Harvey*, 3 Ind. 473.

⁸ *Deux v. Jefferies*, Cro. Eliz. 352; *Ayliff v. Scrimshire*, 1 Show. 46; s. c. nom. *Ayloff v. Scrimshire*, Carth. 63; *Thimbleby v. Barron*, 3 M. & W. 210.

⁹ Post, § 872.

¹⁰ *Bank of Port Gibson v. Baugh*, 9 Sm. & M. 290; *Halton v. Simmell*, 43

¹¹ *Hunter v. Watson*, 12 Cal. 363.

§ 859. **Party to Suit.** — One, after death, cannot bring or defend a lawsuit.¹ And, under the common-law rules, the death of a party abates the suit.² Yet we have statutes under which the representative of one deceased may be substituted and prosecute or defend the cause in his stead. Still, —

§ 860. **Power to bind the Estate.** — It is competent for a living person to make a contract which, on his death, can be enforced against his estate in the hands of executors or administrators.³ This doctrine has its limits,⁴ into which we need not here inquire. But it is always a question whether a contract is to be construed as extending beyond the life, or as terminating at death. Its solution will not depend altogether on the words employed; but equally or more on the —

§ 861. **Nature of the Transaction.** — We have seen that a contract is terminated by the destruction of the thing contracted about;⁵ within which principle, a party's death ends an agreement for his personal services.⁶ But an undertaking, in the same terms, to render services which can as well be done by proxy as in person, and not involving personal confidence, may be enforced against the estate of the deceased party.⁷ A familiar illustration of personal confidence is the relation of —

Texas, 585. There are readers who deem it puerile for an author to lay down a proposition so simple and obvious. But the more simple and obvious a proposition is, the more apt are some to overlook it. I remember that once a very good lawyer advised a widow client, whose husband had been a partner with persons still living, that she must get them to advertise the dissolution of the firm, to save the deceased or herself harmless from future debts of their contracting! Nor would he be convinced of his error; he persevered in it and still insisted, till the thing, for the sake of peace, had to be done — and it was done! Moreover this question appears to have been seriously agitated in *Vuliamy v. Noble*, 3 Meriv. 593. And see *Holme v. Hammond*, Law Rep. 7 Ex. 218.

¹ *Clay v. Oxford*, Law Rep. 2 Ex. 54; *McCreery v. Everding*, 44 Cal. 284.

² *Green v. Watkins*, 6 Wheat. 260; *Livingston v. Rendall*, 59 Barb. 493; *Wallop v. Irwin*, 1 Wils. 315.

³ *Powell v. Graham*, 7 Taunt. 580; *Ross v. Hardin*, 79 N. Y. 84, 91; *Bradbury v. Morgan*, 1 H. & C. 249, 8 Jur. N. S. 918.

⁴ Ante, § 441-443.

⁵ Ante, § 588.

⁶ Ante, § 600, 601; *Baxter v. Burfield*, 2 Stra. 1266; *Stubbs v. Holywell Railway*, Law Rep. 2 Ex. 311.

⁷ Ante, § 603; *Wentworth v. Cock*, 10 A. & E. 42; *Werner v. Humphreys*, 3 Scott N. R. 226, 2 Man. & G. 853; *Quick v. Ludborrow*, 3 Bulst. 29, 30.

§ 862. **Partnership.** — A partnership is *prima facie* presumed to have been entered into by reason of the particular confidence of each partner in the fitness and capacity of the other; hence, in the absence of anything appearing to the contrary, the death of either dissolves it, even where the time limited by agreement for its continuance has not expired.¹ But this rule may be varied by an express stipulation in the partnership contract.²

§ 863. **Joint.** — It is a familiar doctrine of the common law that joint ownership of either real or personal property, when of the intimate sort termed joint tenancy, is not severed by death; but, when one of the owners dies, his interest goes to the survivor or survivors, and nothing to the heir or administrator, until the death of the last joint owner, then all vests in the latter's heir or administrator.³ And, by the unmodified common law, a contract, both as to its burdens and its benefits, is property within this rule. The consequence of which is, that, where two or more persons are parties on the same side, and the promise by or to them is joint, — the ordinary case of a joint contract, — the death of one joint party transmits both his interest and his burdens, not to his administrator, but to his living fellow parties on the same side with himself. They may sue or be sued on it; but the administrator can neither be joined as a party with them, nor sue or be sued alone. This rule extends equally to ordinary joint contractors and to partners.⁴ And, if a second one dies, the same rule applies so long as there is a survivor; but, when there has ceased to be a survivor, all goes to the administrator of the one who died last.⁵ In other words, by the unmodified com-

¹ *Williamson v. Wilson*, 1 Bland, 418, 424, 425; *Gillespie v. Hamilton*, 3 Madd. 251; *Bank of Scotland v. Christie*, 8 Cl. & F. 214.

² *Pemberton v. Oakes*, 4 Russ. 154; *Burwell v. Cawood*, 2 How. U. S. 560; *Powell v. Hopson*, 13 La. An. 626; *Scholefield v. Eichelberger*, 7 Pet. 586, 594; *Walker v. Wait*, 50 Vt. 668.

³ 2 Bl. Com. 183, 184, 399; 4 Kent Com. 360.

⁴ *Walker v. Maxwell*, 1 Mass. 104, 113; *Smith v. Franklin*, 1 Mass. 480; *Calder v. Rutherford*, 3 Brod. & B. 302; *Rolls v. Yate*, Yelv. 177; *Anderson v. Martindale*, 1 East, 497; *Chandler v. Hill*, 2 Hen. & M. 124; *Richards v. Heather*, 1 B. & Ald. 29; *Hedderly v. Downs*, 31 Minn. 183; *Daby v. Ericsson*, 45 N. Y. 786; *Martin v. Crompe*, 1 Ld. Raym. 340; *Jell v. Douglas*, 4 B. & Ald. 374.

⁵ *Rolls v. Yate*, *supra*; *Stowell v.*

mon law, the death of a party to a joint contract, while others on the same side with him still live, terminates both his rights and his duties under it, and transmits them to his associates. But the equity tribunals, and with us the statutes, have together either abrogated this rule or created considerable —

§ 864. **Modifications of the Doctrine.** — Courts of equity, under their jurisdiction to correct mistakes, sometimes, or where express words do not forbid, treat the joint contract as several, and thus transmit a right or obligation to the administrator of the deceased party. In cases of partnership, they always do this.¹ And in still other cases and ways they mollify the harshness of the common-law doctrine,² — questions into which it is not proposed here minutely to inquire. Even courts of law, without the aid of any statute, occasionally mitigate the common-law rule; as, by enforcing contribution between the administrator and the survivor.³ Thus, Parsons observes, that “*Bachelder v. Fiske*⁴ was perhaps the earliest case where the executor of a deceased co-debtor was held liable at law for contribution. The court there met the technical objections that were raised, with the maxim, *Ubi jus ibi remedium*.”⁵ Probably this case could never, without the aid of a statute, be accepted for universal doctrine; because, as explained in the last section, the law of the common-law courts recognizes in such circumstances no *jus*, hence it can allow no *remedium*. But statutes, varying in our States, therefore not to be set out or expounded here, have either overturned or greatly changed the old doctrine. The practitioner should carefully search for those of his own State.⁶ A word may be desirable as to the special case of a —

Drake, 3 Zab. 310; Gere v. Clarke, 6 Hill, N. Y. 350.

¹ 1 Story Eq. § 162-164; Sumner v. Powell, 2 Meriv. 30; Beresford v. Browning, 1 Ch. D. 30.

² Gere v. Clarke, 6 Hill, N. Y. 350.

³ Mowry v. Adams, 14 Mass. 327; Williams v. Moore, 9 Pick. 432; Stothoff v. Dunham, 4 Harrison, 181. And see

Batard v. Hawes, 2 Ellis & B. 287; Prior v. Hembrow, 8 M. & W. 873.

⁴ Bachelder v. Fiske, 17 Mass. 464.

⁵ 1 Pars. Con. 32, note.

⁶ Randall v. Sackett, 77 N. Y. 480; Richardson v. Draper, 87 N. Y. 337; Devol v. Halstead, 16 Ind. 287; Knox County Sav. Bank v. Cottey, 70 Misso. 150; Greathouse v. Kline, 93 Ind. 598; Louis v. Triscony, 58 Cal. 304.

§ 865. **Surety.** — Where the form of the surety's undertaking was a joint promise with the principal debtor, the creditor, it is perceived, lost on the surety's death his claim against him at law. In this case, the courts of equity declined, for a technical reason, to give relief;¹ so that, to every intent and purpose, the death of such surety discharged him.² The South Carolina court has refused to accept this doctrine,³ perhaps some other courts also, and there are States in which it has been abrogated by statute.⁴

§ 866. **Several, or Joint and Several.** — Where the obligation or the right, instead of being joint, is either several or joint and several, it descends on a party's death to his administrator.⁵

IV. *Release otherwise by Operation of Law.*

§ 867. **Doctrine defined.** — The doctrine of this sub-title is, that whenever, by the course of procedure in court, or by any rule of law, a party may so avail himself of a release to another,⁶ or of any other collateral matter, as to prevent judgment being rendered against him, he is thereby released by operation of law. Thus, —

§ 868. **Several Parties on a Side.** — Where there are two or more promisors or promisees, a transaction with one of them may or may not, according to its nature, preclude a judgment for or against another or the rest. If it does have this effect, it is a release by operation of law. The authorities appear a little obscure, and there may be cases not rightly decided; but, if we look a little below the surface into the reasons which govern this sort of question, we shall find the line distinguishing the two classes fairly plain, and all will seem comprehensible and just.

¹ 1 Story Eq. § 164.

² *Davis v. Van Buren*, 72 N. Y. 587, 589; *Wood v. Fisk*, 63 N. Y. 245; *Waters v. Riley*, 2 Har. & G. 305; *Richardson v. Draper*, 87 N. Y. 337.

³ *Susong v. Vaiden*, 10 S. C. 247.

⁴ *Randall v. Sackett*, 77 N. Y. 480. And see, on this general question, Rich-

ardson v. Draper, supra; *Stothoff v. Dunham*, 4 Harrison, 181; *Mowry v. Adams*, 14 Mass. 327; *Williams v. Moore*, 9 Pick. 432.

⁵ *Tippins v. Coates*, 18 Beav. 401; *Church v. King*, 2 Myl. & C. 220.

⁶ Ante, § 241.

§ 869. **Release of Joint Promisor.**— One to whom two or more persons have made a joint promise or covenant is, on its breach, required by the course of judicial procedure to sue all jointly if all are of full age¹ and alive;² and, should he proceed against a less number, his suit, if properly defended, will fail.³ So that all can avail themselves of a release to any one; whence the rule, that the release of one discharges all,⁴ — a rule which perhaps ordinarily, yet not always, prevails as well in equity as at law.⁵

§ 870. **Joint and Several Promisors — (Further of Joint).**— Where the promises or covenants are joint and several instead of joint, the reasoning is a little different. The party suing may elect to proceed against one or each singly, or jointly against all, but not against more than one and less than all.⁶ If, therefore, he sues one, the mere fact that he has not joined another defendant is not, as in the case of a joint undertaking, an obstacle to his recovering judgment. But if one who might have been made a joint defendant has paid the debt, it is discharged, and there can be no judgment against another.⁷ Death, we saw under our last sub-title, is not, in these cases of joint and several, the equivalent of payment; so it does not operate to discharge either the living person or the estate of the deceased.⁸ But other things may be equivalents; “as, if two men be jointly and severally bounden in an obligation, if the obligee release to one of them, both are discharged.”⁹

¹ *Cutts v. Gordon*, 13 Maine, 474. See post, § 871.

² *Cabell v. Vaughan*, 1 Saund. Wms. ed. 291 and note; *Douglas v. Chapin*, 26 Conn. 76; *Bragg v. Wetzel*, 5 Blackf. 95.

³ *Livingston v. Tremper*, 11 Johns. 101; *Tuttle v. Cooper*, 10 Pick. 281; *Shirreff v. Wilks*, 1 East, 48; *Walcott v. Canfield*, 3 Conn. 194; *Hall v. Rochester*, 3 Cow. 374. But see *Brugman v. McGuire*, 32 Ark. 733.

⁴ *Lacy v. Kinnaston*, 3 Salk. 298; *Rex v. Bayley*, 1 Car. & P. 435; *Rowley v. Stoddard*, 7 Johns. 207; *Willings v. Consequa*, Pet. C. C. 301; *Campbell v. Brown*, 20 Ga. 415.

⁵ *Bower v. Swadlin*, 1 Atk. 294. But see *The State v. Matson*, 44 Misso. 305.

⁶ *Streatfield v. Halliday*, 3 T. R. 779, 782; *Bangor Bank v. Treat*, 6 Greenl. 207; *Claremont Bank v. Wood*, 12 Vt. 252.

⁷ *Whitcomb v. Whiting*, 2 Doug. 652; *Griffin v. Thomas*, 21 Ga. 198; *Tuckerman v. Sleeper*, 9 Cush. 177, 180; *Boggs v. Lancaster Bank*, 7 Watts & S. 331; *Beaumont v. Greathead*, 2 C. B. 494; *Morrow v. Starke*, 4 J. J. Mar. 367; *Wallace v. Kelsall*, 7 M. & W. 264; *Husband v. Davis*, 10 C. B. 645.

⁸ Ante, § 866.

⁹ Co. Lit. 232 a.

Therefore substantially, if not minutely, the result is the same where the promise is joint and several as where it is joint. And the books commonly state the rule without discrimination to be, that the release of one joint or joint and several promisor is a release of all.¹ But, —

§ 871. **Discharge by Law — (Bankruptcy — Limitations — Infancy).** — Where the law releases a party, it limits the effect to the very person, so that neither a joint nor a joint and several promisor is discharged. Thus it is, for example, if one of two or more such promisors is freed in bankruptcy,² or by the Statute of Limitations;³ and, in these cases, the technical rules above stated are not applied. Consequently, though all the original promisors are joined as defendants, there may be judgment in favor of some and against others.⁴ It is so also where an infant is sued with adults; if he relies on the privilege which the law gives him and sets up infancy in defence, there may be judgment for him and against his co-defendants, or the plaintiff may discontinue as to him and recover his demand of the others.⁵ Again, —

§ 872. **Covenant not to Sue.** — A covenant by the creditor not to sue one joint or joint and several debtor is a different thing from a release. We have seen that such a covenant, if perpetual, will be permitted to bar the covenantor's suit against the covenantee where there are no other parties litigant, because thereby circuity of action is avoided.⁶ But this reason shows, what is settled in authority, that such covenant is not properly a release, that it will not avail the

¹ Line *v.* Nelson, 9 Vroom, 358; Tuckerman *v.* Newhall, 17 Mass. 581, 583; American Bank *v.* Doolittle, 14 Pick. 123, 126; Rowley *v.* Stoddard, 7 Johns. 207, 210.

² Coburn *v.* Ware, 25 Maine, 330; Bowery Sav. Bank *v.* Clinton, 2 Sandf. 113; Turner *v.* Esselman, 15 Ala. 690; Garnett *v.* Roper, 10 Ala. 842

³ Fannin *v.* Anderson, 7 Q. B. 811; Spaulding *v.* Ludlow, &c. Mill, 36 Vt. 150; Bruce *v.* Flagg, 1 Dutcher, 219; Denny *v.* Smith, 18 N. Y. 567; Cutler *v.* Wright, 22 N. Y. 472, 477.

⁴ Coburn *v.* Ware, *supra*; Ward *v.* Johnson, 13 Mass. 148, 152.

⁵ Hartness *v.* Thompson, 5 Johns. 160; Robertson *v.* Smith, 18 Johns. 459, 478; Tuttle *v.* Cooper, 10 Pick. 281, 292; Woodward *v.* Newhall, 1 Pick. 500. As to this point of the text, the reader will find in the decisions some differences which it will be well not to overlook. As to the English doctrine, see Boyle *v.* Webster, 17 Q. B. 950.

⁶ Ante, § 857.

co-promisor, and that it cannot be set up if he also is a defendant.¹ Within this principle, —

§ 873. **Release with Reservations.** — Since it accords with the course of judicial procedure to admit into the record of a cause, by a sort of fiction,² persons as parties who have no interest in it, when thereby the rights of the real parties will be promoted, it is competent for a debtor to release a joint creditor with the proviso that a suit may be prosecuted against him and the rest for the creditor's benefit, execution not to be collected out of his property. Such a release is the exact equivalent of a covenant not to sue. It does not bar a suit, but it gives a right of action for any violation of the terms of the proviso. And words less explicit will be construed in this way when such is the evident meaning. Not all the cases reason out the result quite in this form, but so in effect are all.³ Now, —

§ 874. **Under Seal or not.** — Out of imperfect apprehensions of the doctrine just stated, has, it is believed, grown the proposition, certainly unsound in principle, yet broadly affirmed by some of the judges, that, for a release to bar the claim against a co-promisor, it must be what they term a technical one under seal.⁴ The reason for which was stated by a very learned judge to be, "because" the agreement not under seal "does not extinguish the debt."⁵ And plainly any writing which does not, by whatever name called, must be ineffectual in answer to a suit against any one, whether a party to it or not; as, for example, a writing not under seal and founded on no consideration.⁶ So, as we have

¹ *Walker v. McCulloch*, 4 Greenl. 421, 426; *Winston v. Dalby*, 64 N. C. 299; *Rowley v. Stoddard*, 7 Johns. 207, 210; *Hutton v. Eyre*, 6 Taunt. 289, 294; *Dean v. Newhall*, 8 T. R. 168; *Crane v. Alling*, 3 Green, N. J. 423.

² Ante, § 182.

³ *Solly v. Forbes*, 2 Brod. & B. 38; *Bowne v. Mount Holly Bank*, 16 Vroom, 360; *Parmelee v. Lawrence*, 44 Ill. 405; *Burke v. Noble*, 12 Wright, Pa. 168; *Williams v. Hitchings*, 10 Lea, 326; *North v. Wakefield*, 13 Q. B. 536;

Thompson v. Lack, 3 C. B. 540; *Price v. Barker*, 4 Ellis & B. 760, 777.

⁴ Ante, § 851; *De Zeng v. Bailey*, 9 Wend. 336; *Shaw v. Pratt*, 22 Pick. 305; *Armstrong v. Hayward*, 6 Cal. 183; *Drinkwater v. Jordan*, 46 Maine, 432; *Rowley v. Stoddard*, 7 Johns. 207; *Line v. Nelson*, 9 Vroom, 358.

⁵ *Shaw, C. J. in Pond v. Williams*, 1 Gray, 630, 636; *s. p.* *Gold Medal Sew. Mach. v. Harris*, 124 Mass. 206, 208.

⁶ Ante, § 851; *Smith v. Bartholomew*, 1 Met. 276.

seen,¹ the payment of a part of an entire sum is a discharge only of the part, whatever the unsealed understanding between the parties.² Therefore, if one of two joint promisors makes such payment, neither can avail himself of it beyond the sum paid, though by a writing not under seal there is a formal release in full.³ But our expositions in the chapter on the "Consideration" show, that a payment in something besides money, accepted in full, operates otherwise; for the parties' valuation of the thing will not, in the absence of fraud, be disputed.⁴ Consequently, if one joint promisor makes such payment, the promisee can no more deny its adequacy as being in full, when set up by the other, than when by the party by whom made. Hence, for all purposes, a release without seal is, if on a sufficient consideration, equally effective with a sealed one.⁵

§ 875. **Release by Joint Promisee.** — The payment of a debt to one of two persons to whom it is jointly due is effectual.⁶ Therefore a release by any one of several joint promisees is good as against all.⁷ For example, one partner's signing and sealing a composition deed bars the partnership claim.⁸ But a mere covenant not to sue is within explanations already made,⁹ therefore is without effect except as foundation for a counter action.¹⁰ And, in general, if the whole debt has not been paid to one or validly released by him, the others may join him as party plaintiff in a suit to recover what remains due.¹¹

¹ Ante, § 50.

² *Curtiss v. Martin*, 20 Ill. 557; *Wheeler v. Wheeler*, 11 Vt. 60; *Williams v. Carrington*, 1 Hilton, 515.

³ *Bemis v. Hoseley*, 16 Gray, 63.

⁴ *Gavin v. Annan*, 2 Cal. 494; *Gaffney v. Chapman*, 4 Rob. N. Y. 275.

⁵ Ante, § 851; *Dunham v. Branch*, 5 Cush. 558, 561; *Goss v. Ellison*, 136 Mass. 503.

⁶ *Morrow v. Starke*, 4 J. J. Mar. 367.

⁷ *Myrick v. Dame*, 9 Cush. 248; *Wilkinson v. Lindo*, 7 M. & W. 81; *Wild v. Williams*, 6 M. & W. 490; *Eastman v. Wright*, 6 Pick. 316.

⁸ Met. Con. 125, 126; *Bruen v. Marquand*, 17 Johns. 58; *Smith v. Stone*, 4 Gill. & J. 310; *Pierson v. Hooker*, 3 Johns. 68; *Morse v. Bellows*, 7 N. H. 549; *Crutwell v. DeRosset*, 5 Jones, N. C. 263; *McBride v. Hagan*, 1 Wend. 326; *Wells v. Evans*, 20 Wend. 251; *Evans v. Wells*, 22 Wend. 324.

⁹ Ante, § 872.

¹⁰ *Walmesley v. Cooper*, 11 A. & E. 216.

¹¹ *Sweigart v. Berk*, 8 S. & R. 308; *McGilvery v. Moorhead*, 3 Cal. 267. And see *McNamee v. Carpenter*, 56 Iowa, 276.

§ 876. **Merger** — (**Specialty — Partners**), — by transmuting a contract into something else, may work its termination, though it has not been otherwise performed. It is so, for example, where a specialty has absorbed a parol agreement, as already explained.¹ On which principle, if one of several partners gives his individual bond for a simple contract debt of the firm, the creditor who receives it relinquishes thereby his claim against the rest.² So, —

§ 877. **Merger in Judgment.** — When any contract or other claim has gone to judgment, it ceases to have a separate existence and is merged therein,³ — a proposition having some qualifications not necessary to be inquired into here.⁴ If, then, the judgment is against one of several joint promisors, the claim against the others is, in the absence of any statute reserving rights, ended.⁵ But where it is against them severally, or jointly and severally, instead of jointly, a judgment against one, to have this effect, must be satisfied.⁶

§ 878. **Caution.** — It should be borne in mind that, on the questions connected with this sub-title, there are in many of our States differing statutory limitations and qualifications. And these questions, like all others in the law, are subject also to be varied by changed facts, which bring the particular case outside of the general rule.

§ 879. *The Doctrine of this Chapter restated.*

The teachings of this chapter may be classed with the many illustrations, afforded by the law of contracts, of the

¹ Ante, § 129; *Curson v. Monteiro*, 2 Johns. 308.

² *Tom v. Goodrich*, 2 Johns. 213; *Banorgue v. Hovey*, 5 Mass. 11.

³ *Bangs v. Watson*, 9 Gray, 211; *Clark v. Rowling*, 3 Comst. 216; *Sweet v. Brackley*, 53 Maine, 346.

⁴ *Goodrich v. Bodurtha*, 6 Gray, 323; *Owens v. Sprigg*, 2 Md. 457; *Davis v. Anable*, 2 Hill, N. Y. 339; *Fairchild v. Holly*, 10 Conn. 474.

⁵ *McMaster v. Vernon*, 3 Duer, 249;

Benson v. Paine, 2 Hilton, 552; *Ward v. Johnson*, 13 Mass. 148; *Willings v. Consequa*, Pet. C. C. 301, 303; *Robertson v. Smith*, 18 Johns. 459; *Smith v. Black*, 9 S. & R. 142; *Candee v. Smith*, 93 N. Y. 349, 351; *Clinton Bank v. Hart*, 5 Ohio State, 33.

⁶ *McLaurine v. Monroe*, 30 Misso. 462; *Simonds v. Center*, 6 Mass. 18; *Kirkpatrick v. Stingley*, 2 Ind. 269; *Gilman v. Foote*, 22 Iowa, 560.

truth that earthly things are unstable and changing. In the commotions of life, and the constant adaptations of the mind to the new facts surrounding it, not even a contract, however solemn, is free from the liability to be made more solemn by affirmance, or to be abrogated by release. It is not deemed necessary to extend this chapter further by travelling again over this ground ; except to say, that, on the one hand, when parties have ratified their contract, neither of them can recede by reason of anything then known to him ; and, on the other hand, release may come from express agreement, from death, or from the operation of the law.

BOOK II.

THE PARTIES AND OTHER PARTAKERS AS AGENTS
OR INTERESTED IN THE CONTRACT.

CHAPTER XXXII.

IN GENERAL OF THE PARTIES.

§ 880. **Contracting with Self.** — As already seen,¹ one cannot enter into a contract with himself. If there are apparent exceptions to this rule,² they are anomalies, resting in specially peculiar reasons. Even —

§ 881. **Different Capacities.** — A man in a fiduciary relation — for example, a trustee, or an agent to sell or to buy, or the like — cannot, in this capacity, buy of or sell to, or otherwise deal with, himself in his individual capacity.³ Again, —

§ 882. **Sue Self.** — One cannot sue himself.⁴ Therefore, —

¹ Ante, § 29.

² *Hall v. Bliss*, 118 Mass. 554. As to which see also *Whitehead v. Hellen*, 76 N. C. 99, 100.

³ *Bain v. Brown*, 56 N. Y. 285, 288; *Dutton v. Willner*, 52 N. Y. 312; *Rogers v. Lockett*, 28 Ark. 290; *Ringo v. Binns*, 10 Pet. 269; *Whitcomb v. Minchin*, 5 Madd. 91; *Bent v. Cobb*, 9 Gray, 397; *Michoud v. Girod*, 4 How. U. S. 503; *De Caters v. Le Ray de Chaumont*, 3 Paige, 178; *Child v. Brace*, 4 Paige, 309; *Griffin v. Marine Co.* 52 Ill. 130; *Campbell v. Johnston*, 1 Sandf. Ch. 148; *Boyd v. Hawkins*, 2 Ire. Eq. 304; *Mathews v. Dragaud*, 3 Des. 25; *Thorp v. McCullum*, 1 Gilman, 614; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Davis v.*

Simpson, 5 Har. & J. 147; *Saltmarsh v. Beene*, 4 Port. 283; *Renew v. Butler*, 30 Ga. 954; *Remick v. Butterfield*, 11 Post. N. H. 70; *Rickey v. Hillman*, 2 Halst. 180; *Wright v. Wright*, 2 Halst. 175; *Sheldon v. Sheldon*, 13 Johns. 220; *Obert v. Hammel*, 3 Harrison, 73; *Bank of Orleans v. Torrey*, 7 Hill, N. Y. 260; *Colden v. Walsh*, 14 Johns. 407; *McCarty v. Van Dalfsen*, 5 Johns. 43; *Tynes v. Grimstead*, 1 Tenn. Ch. 508; *Taussig v. Hart*, 58 N. Y. 425; *Collins v. Tilton*, 58 Ind. 374; *Stratford v. Twynam*, Jacob, 418. And see *Armor v. Cochrane*, 16 Smith, Pa. 308.

⁴ Ante, § 29; *Hoag v. Hoag*, 55 N. H. 172.

§ 883. **Self and Another.** — In a common-law court, he cannot be a plaintiff or defendant suing or defending against joint parties, of whom he is one.¹ Nor is it different though on the one side he appears in a fiduciary capacity, and on the other side individually.² Consequently, —

§ 884. **More than One.** — There can be no contract to which there is but one party; there must always be more.³ And, —

§ 885. **Ascertainable.** — When the contract has become complete, and at the time when the suit is brought, however the rule may be before, it must be ascertainable who the party is; though, except by some opinions in specialties,⁴ he need not be named in words, but may be identified by interpretation.⁵ Often a contract is commenced with something which of itself creates no mutual obligation, and is built up step by step until it becomes complete.⁶ In such a case, the last step may be the one which ascertains the party; as, for example, where there is a general offer of a reward for a thing to be done, and a person before unknown does the thing.⁷

§ 886. **Alive — Non-existing.** — Of course, as explained before, the party must be living.⁸ And a contract with a mere fictitious person is a nullity;⁹ nor is it otherwise though the non-existing person or corporation comes afterward into existence.¹⁰

§ 887. **In Created Contracts.** — When the law creates a contract,¹¹ it determines who the parties shall be. For example, it makes the person from whom the consideration moved the promisee.¹² For further illustration, —

¹ *McMahon v. Rauhr*, 47 N. Y. 67; *Moffatt v. Van Mullingen*, 2 Chit. 539; *Rheem v. Snodgrass*, 2 Grant, Pa. 379.

² *McElhanon v. McElhanon*, 63 Ill. 457.

³ Ante, § 29; *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526.

⁴ Ante, § 426; *Sacra v. Hudson*, 59 Texas, 207; *Harrison v. Simons*, 55 Ala. 510.

⁵ Ante, § 374; *Chicago v. Sherwood*, 104 Ill. 549; *Parr v. Greenbush*, 72 N. Y. 463; *Carpenter v. The State*, 8 Misso.

291; *Peddie v. Brown*, 3 Macq. H. L. Cas. 65, 3 Jur. n. s. 895; *Holding v. Elliott*, 5 H. & N. 117; *Taylor v. Hodgson*, 3 Dowl. & L. 115, 10 Jur. 355.

⁶ For example, ante, § 87.

⁷ Ante, § 330.

⁸ Ante, § 858.

⁹ *Bennett v. Farnell*, 1 Camp. 130; *Douthitt v. Stinson*, 63 Misso. 268.

¹⁰ *In re Empress Engineering Co.* 16 Ch. D. 125; *Glass v. Glass*, 71 Ind. 392.

¹¹ Ante, § 181 et seq.

¹² *Morris v. Litchfield*, 14 Bradw. 83;

§ 888. **Funeral Expenses.** — Within explanations already made,¹ if, by reason of the neglect of those whose primary duty it is to cause a dead body to be buried, a third person does it, then, should the executor come into possession of assets, the law will raise a promise from him, not from the dead man, to pay for them.² A *post mortem* examination is not a funeral expense, and not within this rule.³

§ 889. **Capacity of Parties.** — The parties must have the legal capacity, not only to enter into the contract, as will be explained in chapters following this, but likewise to do that for which it provides.⁴ Thus, —

§ 890. **To take.** — A valid conveyance of a thing, or bequest or devise of it,⁵ can be made only to one capable in law of being invested with it, and in the particular form.⁶

§ 891. *The Doctrine of this Chapter restated.*

One cannot make a contract with himself alone; two, at least, are required, and there may be more. It will be valid in law only when the parties are, in law, competent to make it. The chief element in legal capacity is capability in fact. It would be the only element but for some technical rules, necessary for the orderly working of the legal system; such, for example, as that the capability of children shall be conclusively presumed to be incomplete until they are twenty-one years old.

Bright v. Lucas, Peake Add. Cas. 121;
Mellen v. Whipple, 1 Gray, 317, 321;
Tracy v. Gunn, 29 Kan. 508.

¹ Ante, § 237.

² Tugwell v. Heyman, 3 Camp. 298;
Shelly's Case, 1 Salk. 296; Rogers v.
Price, 3 Y. & J. 28; Green v. Salmon,
8 A. & E. 348; Brice v. Wilson, 3 Nev.
& M. 512. See Newcombe v. Beloe,
Law Rep. 1 P. & M. 814.

³ Smith v. McLaughlin, 77 Ill. 596.

⁴ Musselman v. Cravens, 47 Ind. 1.

⁵ Meade v. Beale, Taney, 339, 359.

⁶ Holden v. Smallbrooke, Vaugh.
187, 199; Winslow v. Winslow, 52 Ind.
8; Methodist Episcopal Church v. Ho-
boken, 4 Vroom, 13; The State v. Kil-
lian, 51 Misso. 80.

CHAPTER XXXIII.

INFANTS.

§ 892. Introduction.

893-905. Capacity in General.

906-916. Necessaries and other Created Contracts.

917-923. Valid Actual Contracts.

924-928. Voidable.

929-935. Void.

936-945. Affirmance and Disaffirmance.

946. Doctrine of Chapter restated.

§ 892. **How Chapter divided.** — We shall consider, I. In General of Infants and their Capacity ; II. Their Contract for Necessaries and other Contracts created by the Law ; III. Their Valid Actual Contracts ; IV. Their Voidable Contracts ; V. Their Void Contracts ; VI. Affirmance and Disaffirmance of the Voidable Contract.

I. In General of Infants and their Capacity.

§ 893. **Who are.** — All persons, male and female, under the age of twenty-one years, are, by the common law, infants. In most of our States, the law so remains ; but, in a few of them, females are by statute made of age at eighteen.¹

§ 894. **How Age computed.** — In the computation, fractions of a day² are disregarded, and one day is allowed to the infant ; so that a child born during any part of the twenty-four hours of the first of January, counting from midnight, will be

¹ 1 Parsons Con. 294 ; and the cases cited to the next section. For example, in Minnesota, "females of eighteen years shall be considered of full age for all purposes." *Cogel v. Raph*, 24 Minn. 194. In some of these States, the statutes partially but not fully emancipate the female at eighteen. And see *Dent v. Cock*, 65 Ga. 400.

² Bishop Written Laws, § 108 ; post, § 1340.

of age during the whole of the last day of December, from midnight.¹

§ 895. **Mingled Capacity and Incapacity.** — An infant, constituting one of the community, and possessing an actual capacity increasing with years, and not always being duly cared for by parents, must, both for his own and the public good, be endowed likewise with some legal capacity.² But with how much and what? Nature has furnished us with no precise answer to this question, and the decisions of the courts upon it are discordant. There are propositions reasonably plain and pretty uniformly held in adjudication; but, on the whole, the law of infancy is very much at sea, perhaps more so than any other part of our jurisprudence.³ It has been in some degree changed by the courts from age to age, “the tendency of the later decisions” being, it has been observed, “to enlarge the liabilities and obligations of infants.”⁴ And what adds to the difficulties of the exposition is, that the law is not held quite the same in all our States.

§ 896. **How here.** — To trace the course of decision minutely, and show all that has been and is, would be impossible for the present work, even if the remainder of it were devoted exclusively to the subject. The author, therefore, will present such general views, with their needful illustrations, as will best enable the practitioner to comprehend it, on comparing what is here set down with the statutes and decisions of his own State.

§ 897. **Contracts and Torts compared.** — As a sort of general truth, subject to qualifications, an infant is liable like an adult for his torts, yet not for his contracts unless he chooses to abide by them. But, to go back a little, and explain all somewhat more minutely, —

§ 898. **Emancipation by Parent.** — The emancipation of an

¹ Co. Lit. 171 *b*; Bac. Abr. Infancy, The State *v.* Clarke, 3 Harring. Del. A.; Howard's Case, 2 Salk. 625 · Fitz- 557.

hugh *v.* Dennington, 2 Ld. Raym. 1094, 1096; Anonymous, 1 Ld. Raym. 480; 1801.

Herbert *v.* Turball, 1 Keb. 589; 2 Kent ³ Breed *v.* Judd, 1 Gray, 455, 456.

Com. 233; Wells *v.* Wells, 6 Ind. 447; ⁴ Hall *v.* Butterfield, 59 N.H. 354, 358;

Hamlin *v.* Stevenson, 4 Dana, 597; Philpot *v.* Bingham, 55 Ala. 435, 438.

infant by the parent,¹ or the parent's permitting him to live away from home and take care of himself,² in no way increases his power to bind himself by contract.³ Yet it is often material to the question whether the parent or the infant is to be deemed in law to have been the party contracting with a third person.⁴

§ 899. **Servant of Parent.** — A minor, living with the parent, supported by him, and rendering him service, is in law his servant; otherwise, is not necessarily such.⁵ Like any other servant, —

§ 900. **Wrongful Acts as to Parent.** — The minor may bind his master the father by wrongful acts done in the latter's employment; as, for example, for injuries inflicted on a third person through careless driving.⁶ But, as in the case of other servants, the father will not be liable for his wilful trespasses and torts committed unauthorized;⁷ for example, for setting a dog on his neighbor's cattle.⁸

§ 901. **Torts as to Self.** — In general, but not quite universally,⁹ an infant is answerable the same as an adult for his torts,¹⁰ such as assault and battery,¹¹ injuring another's animal,¹² embezzlement,¹³ and other unlawful conversions of goods¹⁴ or money.¹⁵ But, where the wrong is likewise a breach of contract, the injured party cannot make him liable by suing

¹ Ante, § 230; *Abbott v. Converse*, 4 Allen, 530, 533; *Bucksport v. Rockland*, 56 Maine, 22; *Rex v. Rotherfield Greys*, 1 B. & C. 345, 347; *Reg. v. Scammonden*, 8 Q. B. 349; *Gilkeson v. Gilkeson*, 1 Philad. 194; *Wood v. Corcoran*, 1 Allen, 405; *Jenney v. Alden*, 12 Mass. 375.

² *Rex v. Lytchet Matraverse*, 7 B. & C. 226; *Reg. v. Selborne*, 2 Ellis & E. 275.

³ *Mason v. Wright*, 13 Met. 306, 308.

⁴ *Morse v. Welton*, 6 Conn. 547; *Nightingale v. Withington*, 15 Mass. 272, 274; *Bray v. Wheeler*, 29 Vt. 514; *Shute v. Dorr*, 5 Wend. 204.

⁵ *Clark v. Fitch*, 2 Wend. 459; *Hall v. Hollander*, 4 B. & C. 660; *Evans v. Walton*, Law Rep. 2 C. P. 615.

⁶ *Lashbrook v. Patten*, 1 Duv. 316; *Strohl v. Levan*, 3 Wright, Pa. 177.

⁷ *Paul v. Hummel*, 43 Misso. 119; *Baker v. Haldeman*, 24 Misso. 219.

⁸ *Tift v. Tift*, 4 Denio, 175.

⁹ *Robbins v. Mount*, 4 Rob. N. Y. 553.

¹⁰ *Peterson v. Haffner*, 59 Ind. 130; *Conway v. Reed*, 66 Misso. 346; *Tift v. Tift*, 4 Denio, 175; *Sikes v. Johnson*, 16 Mass. 389; *Bullock v. Babcock*, 3 Wend. 391; *Shaw v. Coffin*, 58 Maine, 254.

¹¹ *Peterson v. Haffner*, supra.

¹² *Tift v. Tift*, supra.

¹³ *Peigne v. Sutcliffe*, 2 McCord, 387.

¹⁴ *Baxter v. Bush*, 29 Vt. 465; *Walker v. Davis*, 1 Gray, 506; *Vasse v. Smith*, 6 Cranch, 226.

¹⁵ *Elwell v. Martin*, 32 Vt. 217.

in the form of tort.¹ This rule does not relieve the infant if he commits a wrong independent of the contract;² as, if he has in his possession a horse under the contract of hiring, then inflicts on it a wilful injury, he may be made to respond in damages.³ And, by the better opinion, if he hires a horse to go to one place and drives it to another, an action of trover will lie against him.⁴

§ 902. **Fraud.** — Infancy seems to have constituted, in early times, an exemption from liability for fraud.⁵ But, by the later and present doctrine, an infant is ordinarily holden for his frauds the same as an adult.⁶ Yet, if, in a common-law court, he is sued on his contract, his plea of infancy is not answered by showing that the plaintiff was induced to enter into it by his fraudulent pretence of being of age.⁷ Still, contrary to some opinions,⁸ even in such a case an action of tort for the fraud may be maintained against him,⁹ or the defrauded adult may rescind the contract, and recover back the goods or other things with which he has parted.¹⁰ And a court of equity, under its jurisdiction to suppress frauds,¹¹ will in many circumstances or commonly hold the infant to a contract which he has entered into through the false pretence of being of age.¹² The doctrines thus stated in this section are believed to be sound in principle, and on the whole suffi-

¹ *Jennings v. Rundall*, 8 T. R. 335.

² *Vasse v. Smith*, 6 Cranch, 226; *Burnard v. Haggis*, 14 C. B. N. S. 45, 9 Jur. N. S. 1325.

³ *Campbell v. Stakes*, 2 Wend. 137, 144.

⁴ *Homer v. Thwing*, 3 Pick. 492; *Penrose v. Curren*, 3 Rawle, 351; *Towne v. Wiley*, 23 Vt. 355; *Green v. Sperry*, 16 Vt. 390.

⁵ *Reeve Dom. Rel.* 259.

⁶ *Wallace v. Morss*, 5 Hill, N. Y. 391; *Ferguson v. Bobo*, 54 Missis. 121, 127; *Loop v. Loop*, 1 Vt. 177; *Lempriere v. Lange*, 12 Ch. D. 675; *Mathews v. Cowan*, 59 Ill. 341.

⁷ *Studwell v. Shapter*, 54 N. Y. 249; *Merriam v. Cunningham*, 11 Cush. 40; *Burley v. Russell*, 10 N. H. 184; *Conrad v. Lane*, 26 Minn. 389.

⁸ *Johnson v. Pie*, 1 Keb. 913, 1 Lev. 169; *Liverpool Adelphi Loan Assoc. v. Fairhurst*, 9 Exch. 422, 430; *Price v. Hewett*, 8 Exch. 146, 148.

⁹ *Fitts v. Hall*, 9 N. H. 441; *Wallace v. Morss*, supra; *Hughes v. Gallans*, 10 Philad. 618; *Lempriere v. Lange*, supra.

¹⁰ *Badger v. Phinney*, 15 Mass. 359; *Mills v. Graham*, 4 B. & P. 140.

¹¹ 1 Story Eq. § 240-242.

¹² *Ex parte Unity Joint Stock Mut. Banking Assoc.* 3 De G. & J. 63, 4 Jur. N. S. 1257; *Nelson v. Stocker*, 4 De G. & J. 458, 5 Jur. N. S. 751. See *Bartlett v. Wells*, 1 B. & S. 836; *Schmitheimer v. Eiseman*, 7 Bush, 298; *Cory v. Gertcken*, 2 Madd. 40.

ciently sustained by the authorities, though on some points the books are not absolutely clear.¹

§ 903. **Estoppel.** — Judicial proceedings, where infants are parties, are commonly in our States required to follow in some particulars special forms. But if they conform thereto, they estop the infant the same as adults are estopped by records correct as to them.² It has been laid down in a few cases that the estoppel *in pais* does not bind an infant,³ — a doctrine believed to be correct to the extent that, as already explained,⁴ if he affirms himself to be of age while making a contract, he may still set up his infancy when sued thereon.⁵ Yet, in the ordinary case, he is concluded by an estoppel *in pais* to the same extent as though he were of full age.⁶ For example, if, having arrived at years of discretion, he stands by and sees a third person sell his estate without disclosing his infancy or other defect in the title, he is bound through the same law of estoppel which in like circumstances would hold an adult.⁷ The doctrine that infancy is no protection against fraud⁸ leads necessarily to this consequence.⁹

§ 904. **Contract.** — The remainder of this chapter will be occupied with expositions of the infant's power of contract. In most things, but not in all, — and there are differences of opinion as to where the lines here run, — an infant's contract has some effect,¹⁰ therefore it is of the sort termed voidable.¹¹ As to —

¹ And see 1 Pars. Con. 317.

² *Beeler v. Bullitt*, 3 A. K. Mar. 280; *Walsh v. Walsh*, 116 Mass. 377; *Ralston v. Lahee*, 8 Iowa, 17; *Joyce v. Joyce*, 5 Cal. 161; *Clark v. Platt*, 30 Conn. 282; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Graham v. Pinckney*, 7 Rob. N. Y. 147; *Wrisley v. Kenyon*, 28 Vt. 5; *Watkins v. Lawton*, 69 Ga. 671; *Albee v. Winterink*, 55 Iowa, 184.

³ *Montgomery v. Gordon*, 51 Ala. 377; *Goodman v. Winter*, 64 Ala. 410; *Lackman v. Wood*, 25 Cal. 147; *Brown v. McCune*, 5 Sandf. 224; *Norris v. Wait*, 2 Rich. 148.

⁴ Ante, § 902.

⁵ *Brown v. McCune*, supra; *Conrad*

v. Lane, 26 Minn. 389; *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Missis. 420. And see *Doran v. Smith*, 49 Vt. 353. But see *Adams v. Fite*, 3 Baxter, 69.

⁶ *Savage v. Foster*, 9 Mod. 35, 38, and the notes to Leach's ed.

⁷ *Ferguson v. Bobo*, 54 Missis. 121; *Davis v. Tingle*, 8 B. Monr. 539. See *Self v. Taylor*, 33 La. An. 769.

⁸ Ante, § 902.

⁹ Ante, § 284, 288, 292.

¹⁰ Ante, § 611, 617.

¹¹ *Bozeman v. Browning*, 31 Ark. 364; *Carpenter v. Carpenter*, 45 Ind. 142; *Betts v. Carroll*, 6 Misso. Ap. 518; *Hyer v. Hyatt*, 3 Cranch, C. C. 276;

§ 905. **Adults contracting with Infants** — A void contract, being absolutely without legal effect, no more binds an adult party to it than the infant.¹ But a voidable holds the adult so long as the infant is in the fulfilment of his part, and does not avoid it.² Of course, a contract absolutely valid as to the infant is the same also as to the adult.

II. *The Contract for Necessaries, and other Contracts created by the Law.*

§ 906. **Law's Creation — (Antenuptial Debts).** — Within the principles governing the creation of contracts by the law,³ plainly infancy can be no impediment; for, if an infant is under a legal duty,⁴ there is the same reason for the law's creating a promise from him to discharge it as where the like duty rests on an adult. An illustration of this has already been given in the proposition that, since under the common-law rules marriage imposes on the husband the obligation to pay his wife's antenuptial debts,⁵ it is no ground of exemption that he is an infant.⁶ For further illustration, —

§ 907. **Surety in Criminal Case.** — Since an infant proceeded against criminally can bind himself by recognizance,⁷ one who in pursuance of a legal requirement becomes his surety therein is entitled to recover of him, on a contract created by the law,⁸ what he is compelled to pay.⁹

§ 908. **Necessaries.** — The most familiar illustration is where necessaries are furnished to an infant not otherwise supplied; he must live, so, as already explained, the law creates a promise from him to the person providing them to pay what they are worth.¹⁰ The books often speak of this con-

Dunton v. Brown, 31 Mich. 182; Green v. Wilding, 59 Iowa, 679.

¹ Oliver v. Houdlet, 13 Mass. 237, 239; Warwick v. Bruce, 2 M. & S. 205, 206.

² Post, § 936; Bruce v. Warwick, 6 Taunt. 118; Warwick v. Bruce, 2 M. & S. 205; Nightingale v. Withington, 15 Mass. 272; Thompson v. Hamilton, 12 Pick. 425; Holt v. Clarencieux, 2 Stra. 937.

³ Ante, § 181 et seq.

⁴ Ante, § 184.

⁵ Mitchinson v. Hewson, 7 T. R. 348; Pitkin v. Thompson, 13 Pick. 64, 67.

⁶ Ante, § 201; Roach v. Quick, 9 Wend. 238; Cole v. Seeley, 25 Vt. 220.

⁷ 1 Bishop Crim. Proceed. § 264 c.

⁸ Ante, § 214, 216.

⁹ Dial v. Wood, 9 Baxter, 296.

¹⁰ Ante, § 234.

tract as though it were an express one, which the law authorizes the infant to make; but the doctrine is universal that the measure of his liability is the value of the necessities, not what he promised to pay for them,¹ so there is no propriety in designating the undertaking as express, for it is what the law and not the infant has made it.²

§ 909. **What are Necessaries.**—Necessaries for an infant are similar to necessities for a wife, explained by the author in another work.³ Regard must be had to his means, occupation, and standing in society; in other words, to his estate and condition in life.⁴ And necessities are such things as are required for the particular infant's⁵ reasonable comfort, subsistence,⁶ and education. In the words of Coke, they are "his necessary meat, drink, apparel, necessary physic [which will include medical attendance⁷], and such other necessities, and likewise his good teaching or instruction, whereby he may profit himself afterwards."⁸ Nursing in sickness,⁹ drawing a tooth which gives pain,¹⁰ burying a deceased husband or wife,¹¹ food and clothing not exceeding the due limits as to quantity or kind,¹²—these are severally illustrations of what is necessary for every infant not otherwise supplied. A watch and chain,¹³ a horse,¹⁴ livery for a servant,¹⁵—dinner, confectionery, and fruit in addition to the ordinary board,¹⁶—

¹ *Hyer v. Hyatt*, 3 Cranch, C. C. 276; *Commonwealth v. Hantz*, 2 Pa. 333; *Morton v. Steward*, 5 Bradw. 533; *Bouchell v. Clary*, 3 Brev. 194; *Fairmount, &c. Passenger Railway v. Stutler*, 4 Smith, Pa. 375.

² And see *Stone v. Dennison*, 13 Pick. 1; *Earle v. Reed*, 10 Met. 387; *Gay v. Ballou*, 4 Wend. 403; *Hyman v. Cain*, 3 Jones, N. C. 111; *Robinson v. Weeks*, 56 Maine, 102.

³ 1 Bishop Mar. & Div. § 554.

⁴ *Burghart v. Angerstein*, 6 Car. & P. 690; *Dalton v. Gib*, 7 Scott, 117, 3 Jur. 43; *Peters v. Fleming*, 6 M. & W. 42; *Ive v. Chester*, Cro. Jac. 560.

⁵ *Ryder v. Wombwell*, Law Rep. 4 Ex. 32, 38.

⁶ Ante, § 232, 234.

⁷ *Hoyt v. Casey*, 114 Mass. 397; *Wailing v. Toll*, 9 Johns. 141.

⁸ Co. Lit. 172 a.

⁹ *Werner's Appeal*, 10 Norris, Pa. 222.

¹⁰ *Strong v. Foote*, 42 Conn. 203.

¹¹ *Chapple v. Cooper*, 13 M. & W. 252.

¹² *Ib*; *Maddox v. Miller*, 1 M. & S. 738; *Angel v. McLellan*, 16 Mass. 28; *Gay v. Ballou*, 4 Wend. 403; *Barnes v. Toye*, 13 Q. B. D. 410; *Anderson v. Smith*, 33 Md. 465.

¹³ *Barnes v. Toye*, supra at p. 414; *Berolles v. Ramsay*, Holt, N. P. 77; *Peters v. Fleming*, 6 M. & W. 42.

¹⁴ *Hart v. Prater*, 1 Jur. 623. See *Cornelia v. Ellis*, 11 Ill. 584; *Rainwater v. Durham*, 2 Nott & McC. 524.

¹⁵ *Hands v. Slaney*, 8 T. R. 578.

¹⁶ *Brooker v. Scott*, 11 M. & W.

are examples of what will be deemed necessities or not according to the attending facts. Tobacco, including pipes and cigars, is never, unless in very special circumstances, a necessary for an infant.¹ Said Parke, B. "from the earliest time down to the present, the word 'necessaries' was not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is."² Therefore the question whether things in controversy were necessities or not depends on what is special to the individual case, and is a mixed one of law and fact;³ and it is to be decided by the jury, under proper instructions and control from the court.⁴

§ 910. **Wife.**—An infant is, to the same extent as an adult,⁵ liable for necessities supplied to his wife.⁶

§ 911. **Necessaries as to Business — Protection of Property.**—An infant, not being deemed in law competent to conduct business, is, therefore, if he enters upon it, not liable as for necessities for things without which it cannot be carried on;⁷ such, for example, as goods, the rent of a shop, and help therein.⁸ But if the law has, as in some of our States after marriage, intrusted the infant with the management of his property, it, therefore, makes him responsible for necessary supplies.⁹ There are cases which hold an infant not compellable to pay for repairs to his dwelling-house, however indis-

67; *Wharton v. Mackenzie*, 5 Q. B. 606.

¹ *Bryant v. Richardson*, 12 Jur. n. s. 300, Law Rep. 3 Ex. 93, note.

² *Peters v. Fleming*, supra at p. 46; approved by Denman, C. J. in *Wharton v. Mackenzie*, supra at p. 611.

³ *Ryder v. Wombwell*, Law Rep. 4 Ex. 32, 38.

⁴ *Ryder v. Wombwell*, supra; *Merriam v. Cunningham*, 11 Cush. 40, 44; *Davis v. Caldwell*, 12 Cush. 512, 514; *Wharton v. Mackenzie*, supra.

⁵ Ante, § 235; *Harrison v. Fane*, 1 Scott, N. R. 287; s. c. nom. *Harris v. Fane*, 4 Jur. 508.

⁶ *Cantine v. Phillips*, 5 Harring. Del.

428; *Chapman v. Hughes*, 61 Missis. 339; *Turner v. Trisby*, 1 Stra. 168.

⁷ *Mason v. Wright*, 13 Met. 306; *Warwick v. Bruce*, 2 M. & S. 205, 209; *Goode v. Harrison*, 5 B. & Ald. 147, 157; *Decell v. Lewenthal*, 57 Missis. 331.

⁸ *Whywall v. Champion*, 2 Stra. 1083; *Dilk v. Keighley*, 2 Esp. 480; *Lowe v. Griffith*, 1 Scott, 458, 460; *Smith v. Kelley*, 13 Met. 309.

⁹ *Chapman v. Hughes*, 61 Missis. 339. And see *Huff v. Bournell*, 48 Ga. 338; *Decell v. Lewenthal*, supra; *Rundel v. Keeler*, 7 Watts, 237; *Watson v. Hensel*, 7 Watts, 344; *Mohney v. Evans*, 1 Smith, Pa. 80.

pensible for its preservation ;¹ but this is contrary to reason, for the law endows him with full ownership, the same as an adult, and there is not one legal principle which could properly require him to leave it to drop down and be ruined for the want of repairs.²

§ 912. **Already Supplied.**— One cannot recover of an infant pay for things with which he is already, from whatever source, sufficiently supplied, however necessary they would otherwise be.³ And —

§ 913. **Tradesman's Peril — (Proofs).**— A tradesman, who furnishes necessaries to the infant, can do as he pleases about inquiring into the facts ; still, on a suit, he must prove all the elements of the defendant's responsibility ; so that, if he acts without inquiry, he does it at his peril. But this rule does not exclude those presumptions, not for consideration here, which the law of evidence has established.⁴

§ 914. **Money** — is not a necessary in the technical sense, however essential it is practically found to be. So that one who lends money to an infant cannot recover it at law, even though the infant afterward expends it for necessaries.⁵ But one who at his request pays money to a third person for necessaries can recover it.⁶ And in equity the mere lender is permitted to stand in the place of the infant, so as to have back his money if the latter pays it away for necessaries.⁷

¹ *Tupper v. Cadwell*, 12 Met. 559 ; *Anonymous*, 3 Salk. 195. See *Mathes v. Dobschuetz*, 72 Ill. 438 ; *Price v. Sanders*, 60 Ind. 310.

² And see the principles explained in *Hall v. Butterfield*, 59 N. H. 354 ; *Bartlett v. Bailey*, 59 N. H. 408. **Counsel Fees** — for the securing of property to the infant, *Epperson v. Nugent*, 57 Missis. 45 ; *Dillon v. Bowles*, 77 Misso. 603.

³ *Barnes v. Toye*, 13 Q. B. D. 410 ; *Nichol v. Steger*, 6 Lea, 393, 2 Tenn. Ch. 328 ; *Nicholson v. Wilborn*, 13 Ga. 467 ; *Johnson v. Lines*, 6 Watts & S. 80 ; *Kraker v. Byrum*, 13 Rich. 163 ; *Hoyt v. Casey*, 114 Mass. 397 ; *Cook v. Deaton*, 3 Car. & P. 114 ; *Burghart v. Angerstein*, 6 Car. & P. 690.

⁴ Ante, § 234 ; *Barnes v. Toye*, 13 Q. B. D. 410 ; *Story v. Pery*, 4 Car. & P. 526 ; *Brayshaw v. Eaton*, 7 Scott, 183, 3 Jur. 222 ; *Nicholson v. Wilborn*, 13 Ga. 467.

⁵ *Randall v. Sweet*, 1 Denio, 460 ; *Darby v. Boucher*, 1 Salk. 279 ; *Earle v. Peale*, 1 Salk. 386, 10 Mod. 67 ; *Probart v. Knouth*, 2 Esp. 472, note ; *Price v. Sanders*, 60 Ind. 310. See *Ellis v. Ellis*, 1 Ld. Raym. 344, 5 Mod. 368 ; *Hedgley v. Holt*, 4 Car. & P. 104.

⁶ *Swift v. Bennett*, 10 Cush. 436 ; *Randall v. Sweet*, supra ; *Conn v. Coburn*, 7 N. H. 368 ; *Smith v. Oliphant*, 2 Sandf. 306 ; *Haine v. Tarrant*, 2 Hill, S. C. 400 ; *Clarke v. Leslie*, 5 Esp. 28.

⁷ *Marlow v. Pitfeild*, 1 P. Wms. 558 ; *Price v. Sanders*, supra.

§ 915. **Infant having Money.**—Though an infant has at command the money wherewith to buy necessities, this is not equivalent to his being supplied; so it is in his power, instead of paying, to charge himself with them.¹

§ 916. **Infant's Express Promise.**—Commonly an infant ordering necessities makes an express promise to pay for them, the same as would an adult. This is not essential to his legal liability,² yet the credit must not have been given to another person.³ And we have seen that the sum promised is not the measure of his indebtedness, it is the actual value of the things.⁴ If, in these circumstances, he delivers as in payment his bond, promissory note, or other written undertaking, wherein the sum mentioned may be quite different from what the law declares it to be, plainly it cannot be a payment in law, though it may be regarded as something collateral. We could not hold it void; for, if we did, and it gave time to the infant, the adult party might sue him immediately, in violation of the bargain.⁵ And still it is sometimes said that such an instrument is void;⁶ and that no action can be maintained upon it, but only on the consideration for which it was given.⁷ The true and inevitable doctrine appears to be, to hold it in a peculiar sense⁸ voidable; so that, as Parsons expresses it, "he may be sued upon the instrument, but the plaintiff shall recover only the value of the necessities."⁹ The decisions are perhaps in some degree reconcilable; on their face, they seem a good deal in conflict.¹⁰

¹ *Burghart v. Hall*, 4 M. & W. 727; *Barnes v. Toye*, 13 Q. B. D. 410, 412. But see *Rivers v. Gregg*, 5 Rich. Eq. 274.

² *Gay v. Ballou*, 4 Wend. 403.

³ *Sinklear v. Emert*, 18 Ill. 63; *St. Joseph's Academy v. Augustini*, 55 Ala. 493.

⁴ *Ante*, § 908.

⁵ *Ante*, § 905.

⁶ 2 Kent Com. 235; *Swasey v. Vanderheyden*, 10 Johns. 33; *Bouchell v. Clary*, 3 Brev. 194.

⁷ *McCrillis v. How*, 3 N. H. 348; *McMinn v. Richmonds*, 6 Yerg. 9.

⁸ *Ante*, § 617.

⁹ 1 Pars. Con. 313.

¹⁰ *Martin v. Gale*, 4 Ch. D. 428; *Dubose v. Wheddon*, 4 McCord, 221; *Bradley v. Pratt*, 23 Vt. 378; *Ray v. Tubbs*, 50 Vt. 688, 694, 695; *Williamson v. Watts*, 1 Camp. 552; *Cooper v. The State*, 37 Ark. 421; *Howard v. Simpkins*, 70 Ga. 322. And see cases cited in 1 Pars. Con. as above. "An infant is liable for necessities, but cannot give a bond for them." *Buller, J. in Caudell v. Shaw*, 4 T. R. 361, 363. To the like effect, *Co. Lit.* 172 a. And, as to the form of action, there may be difficulties where the suit is on a specialty, and the recovery is on the law's

III. *The Infant's Valid Actual Contracts.*

§ 917. **Valid, Voidable, Void, distinguished.** — A contract which infant parties make for themselves may be valid, voidable, or void. And the common rule for determining to which class a particular one belongs is, that, if it is clearly for the infant's benefit, it is valid, binding him the same as though he were an adult; if clearly to his disadvantage, it is void; and if it is, as most contracts are, not certainly the one or the other, it may be avoided by him, or not, at his election.¹ "This," said a learned judge, "may answer well enough as a general rule, but it must be subject to exceptions."² It doubtless states, with reasonable correctness, the principle; but, in practice, it cannot in its nature be other than an imperfect guide. It is less regarded in later times than formerly; or, at least, many contracts once deemed valid or void are now relegated to the class which has been permitted almost to absorb the other two, namely, the voidable. Nor does it quite cover every sort of case; thus, —

§ 918. **What Law requires.** — "Whatsoever an infant is bound to do by law," says Coke, "the same shall bind him albeit he doth it without suit of law;"³ as, if he is an exec-

promise which, we have seen, is not such. Ante, § 203. Therefore the rule has sometimes been laid down to be, that, where the instrument is of a sort precluding inquiry into the consideration (as to which see ante, § 75, 124, note, 275), it is void; where not, the value of the articles may be recovered in a suit thereon. *Cooper v. The State*, supra, referring to *Reeve Dom. Rel.* 229, 230; *Stone v. Dennison*, 13 Pick. 1, 6, 7; *Guthrie v. Morris*, 22 Ark. 411. In reason, this distinction does not solve the difficulty; for the suit is not on the consideration, but on the promise.

¹ *Vent v. Osgood*, 19 Pick. 572, 573; *Baker v. White*, 2 T. R. 159, 161; *Swafford v. Ferguson*, 3 Lea, 292; *Rex v. Wigston*, 3 B. & C. 484, 486, 5 D. &

R. 339; *Keane v. Boycott*, 2 H. Bl. 511; *Rex v. Arundel*, 5 M. & S. 257; *Dunton v. Brown*, 31 Mich. 182; *Philpot v. Bingham*, 55 Ala. 435, 438; *Green v. Wilding*, 59 Iowa, 679; *Baylis v. Dineley*, 3 M. & S. 477; *Strain v. Wright*, 7 Ga. 568; *Bryan v. Walton*, 14 Ga. 185; *Oliver v. Houdlet*, 13 Mass. 237; *Whitney v. Dutch*, 14 Mass. 457; *Thompson v. Hamilton*, 12 Pick. 425; *Wheaton v. East*, 5 Yerg. 41; *Radford v. Westcott*, 1 Des. 596.

² *Bronson, J.* in *Fonda v. Van Horne*, 15 Wend. 631, 635.

³ *Co. Lit.* 172 a; 2 *Kent Com.* 242, 243; *Baker v. Lovett*, 6 Mass. 78, 80; *Abbot v. Parsons*, 3 Bur. 1794, 1801; *Prouty v. Edgar*, 6 Iowa, 353.

utor, his acquittance upon payment is valid, but not without payment, the law requiring it in the former case yet not in the latter.¹ Or, as more broadly put by Bronson, C. J., "when an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation."² Within which principle, an infant who is compellable to make partition is concluded by one which he executes voluntarily.³ And the Vermont court has even held the infant liable on his promissory note given in settlement of a tort.⁴ Leaving this sort of case, —

§ 919. **Executory, Executed, distinguished.** — There is a wide distinction between an infant's mere executory promises, and those which are executed;⁵ the latter being in many circumstances irrevocable, but seldom or never the former except where created by law. For example, "if," in the words of Lord Kenyon, "an infant was to buy a thing, not being necessities, he could not be compelled to pay for it; but, having done so, he could not recover back the money."⁶ Further as to which, —

§ 920. **Executory Promise in Fact.** — As explained in the last sub-title, there are many contracts in form express, while in truth they are creations of the law, which, instead of the express undertaking of the infant, gives them their character and effect.⁷ Leaving these out of consideration, there are believed to be no exceptions, certainly none unless in very special cases, to the proposition that whatever mere executory promise an infant makes, and though the consideration for it has been paid to him, and, at least as the general rule, though he has neither returned nor offered to return it,⁸ he cannot be

¹ Co. Lit. ut sup.

² *People v. Moores*, 4 Denio, 518, 519. See *Kilcrease v. Shelby*, 23 Missis. 161.

³ *Bavington v. Clarke*, 2 Pa. 115; *Abbot v. Parsons*, supra; *Cocks v. Simmons*, 57 Missis. 183. See *Rogers v. Cruger*, 7 Johns. 557.

⁴ *Ray v. Tubbs*, 50 Vt. 688; compare with ante, § 901, 916.

⁵ *Spicer v. Earl*, 41 Mich. 191.

⁶ *Wilson v. Kearse*, Peake Add. Cas. 196, — a dictum unquestionably sound, but the point decided is contrary to other authorities.

⁷ For further illustrations see ante, § 202, 203; *Evelyn v. Chichester*, 3 Bur. 1717, 1719; *Crisp v. Churchill*, cited 1 B. & P. 340.

⁸ *Craighead v. Wells*, 21 Misso. 404.

compelled either to perform it or to pay damages for its non-performance.¹ But—

§ 921. **Executed.**— There are many contracts of the infant which, when executed, he can no more revoke than could an adult. It is believed to be impossible, in the present condition of the authorities, to formulate a rule distinguishing these from the revocable. The doctrine appears to grow out of the practical necessities of business, which, rather than any rights or capacity of the infant or rights of third persons, furnish its limits. For example, it is within what has already been laid down² to say, that, if an infant goes upon the streets of a city shopping, he cannot afterward retrace his steps and get back the money he paid, even though he tenders the goods in return; for to permit it would render shop-keeping impossible. One distinction appears to be, that, where an infant makes with another person a contract, then pays or does something toward performance, then repudiates it, he can have again or recover from such person his money or the pay for what he did, if in the transaction he has received nothing, but not if he has enjoyed a substantial benefit,—a distinction not sustained by all the cases, but apparently by the greater number.³ And though something has come to the infant, if the parties can be placed *in statu quo*,⁴ he may return it and take back what he parted with;⁵

¹ *Flexner v. Dickerson*, 72 Ala. 318, 322. This, being a negative proposition, is consequently not provable affirmatively by the cases; but, I believe, there is no sufficient authority against it. And see *Met. Con.* 42, 43; 1 *Chit. Con.* 11th Am. ed. 194; *Ware v. Cartledge*, 24 Ala. 622; *Hunt v. Peake*, 5 Cow. 475; *Wilt v. Welsh*, 6 Watts, 9; *West v. Gregg*, 1 Grant, Pa. 53; *Handy v. Brown*, 1 Cranch C. C. 610; *Clark v. Goddard*, 39 Ala. 164; *Vinsen v. Lockard*, 7 Bush, 458; *Story v. Pery*, 4 Car. & P. 526; *McCoy v. Huffman*, 8 Cow. 84; *Dilk v. Keighley*, 2 Esp. 480.

² Ante, § 919, 920.

³ *Medbury v. Watrous*, 7 Hill, N. Y. 110, and cases there cited; *Breed v. Judd*,

1 Gray, 455, 457; *Aldrich v. Abrahams*, Hill & Denio, 423; *Pitcher v. Turin Plank Road*, 10 Barb. 436; *Heath v. Stevens*, 48 N. H. 251; *Shurtleff v. Millard*, 12 R. I. 272; *Holmes v. Blogg*, 8 Taunt. 508; *Stone v. Dennison*, 13 Pick. 1; *Lempriere v. Lange*, 12 Ch. D. 675; *Harney v. Owen*, 4 Blackf. 337; *Van Pelt v. Corwine*, 6 Ind. 363; *Lufkin v. Mayall*, 5 Fost. N. H. 82; *Whitmarsh v. Hall*, 3 Denio, 375; *Ray v. Haines*, 52 Ill. 485; *Meredith v. Crawford*, 34 Ind. 399; *Gaffney v. Hayden*, 110 Mass. 137; *Corpe v. Overton*, 10 Bing. 252, 3 Moore & S. 738.

⁴ Ante, § 679, 818, 833.

⁵ *Towle v. Dresser*, 73 Maine, 252, 256.

and, since he is liable like an adult for fraud and other similar wrongs,¹ he cannot, *of fraud*, have again the one, without restoring the other.² Within which principle, if money or any other thing is paid him,—for example, if he takes rent,³—he cannot recover it over again after becoming of age.⁴ The mere repudiating of his agreement is not deemed a legal fraud;⁵ and, if he has consumed the consideration of his deed, his inability to restore it will not prevent a disaffirmance.⁶ An infant's indorsement, for a valuable consideration, of a promissory note, is irrevocable.⁷ Nor, after his money has been paid away at his request by a third person, can he recover it back from the latter.⁸ Again, when he has put money into a partnership and done work for it, he cannot, on rescinding the partnership agreement, demand of his late partner such money and the pay for his labor.⁹ Still he is not, beyond the sum rendered into the firm, liable for its debts.¹⁰ The books furnish numerous other instances, depending, it is believed, mainly, if not on prior authorities, upon what the judges deem to be fit and practical in the particular sort of case.

§ 922. **Specially Authorized.**—Contracts which the infant has made under the authority of a statute,¹¹ or of a person¹² or court¹³ invested with power to confirm them, whether executory or executed, will bind him. But mere general

¹ Ante, § 901, 902; *Shaw v. Coffin*, 58 Maine, 254; *School District v. Bragdon*, 3 *Fost. N. H.* 507; *Oliver v. McClellan*, 21 *Ala.* 675; 2 *Kent Com.* 241.

² *Kerr v. Bell*, 44 *Misso.* 120; *Bryant v. Pottinger*, 6 *Bush*, 473; *Williams v. Brown*, 34 *Maine*, 594; *Smith v. Evans*, 5 *Humph.* 70; *Heath v. West*, 8 *Fost. N. H.* 101; *Riley v. Mallory*, 33 *Conn.* 201.

³ *Parker v. Elder*, 11 *Humph.* 546.

⁴ *Holmes v. Blogg*, 2 *Moore*, 552; *Taft v. Pike*, 14 *Vt.* 405. See *Riley v. Mallory*, *supra*.

⁵ *Burns v. Hill*, 19 *Ga.* 22.

⁶ *Green v. Green*, 7 *Hun.* 492; *Chandler v. Simmons*, 97 *Mass.* 508, 514; *Bartlett v. Drake*, 100 *Mass.* 174, 177; *Manning v. Johnson*, 26 *Ala.* 446; *Mil-*

ler v. Smith, 26 *Minn.* 248; *Green v. Green*, 69 *N. Y.* 553.

⁷ *Nightingale v. Withington*, 15 *Mass.* 272. See *Taylor v. Croker*, 4 *Esp.* 187.

⁸ *Welch v. Welch*, 103 *Mass.* 562.

⁹ *Page v. Morse*, 128 *Mass.* 99; *Moley v. Brine*, 120 *Mass.* 324, 326. See *Brown v. Hartford Fire Ins. Co.* 117 *Mass.* 479; *Sadler v. Robinson*, 2 *Stew.* 520.

¹⁰ *Bush v. Linthicum*, 59 *Md.* 344.

¹¹ *Northwestern Railway v. Michael*, 5 *Exch.* 114; *In re Higgins*, 16 *Wis.* 351; *Gavin v. Burton*, 8 *Ind.* 69; *The State v. Baker*, 9 *Rich. Eq.* 521.

¹² *May v. Webb*, Kirby, 286.

¹³ *In re Letchford*, 2 *Ch. D.* 719. See *Anderson v. Ammonett*, 9 *Lea*, 1.

words in a statute are not ordinarily interpreted to exclude infants from their privilege of minority.¹

§ 923. **Receive and Hold.** — (**Gift**). — An infant may receive and hold property, real and personal, the same as an adult;² except, perhaps, in cases where it is attended with a burden which may prove prejudicial.³ A gift from a father to his infant child vests the ownership in the latter;⁴ and a gift from a third person, — for example, bounty money for enlisting as a soldier,⁵ — transmits the thing given, not to the father, but to the minor child.⁶ Even the ordinary clothing of an infant is properly treated as his;⁷ though, at least in some circumstances, it may, at the election of the party, be equally regarded as the father's.⁸

IV. *The Infant's Voidable Contracts.*

§ 924. **Most Contracts** — of the infant are, as already explained, neither absolutely binding on him nor wholly void, but voidable by him and good as against the adult party.⁹ Thus, —

§ 925. **Illustrations of the Voidable** — are the infant's partnership agreements;¹⁰ his conveyances of his real¹¹ and personal¹² property; commonly his promissory notes;¹³ his

¹ Bishop Written Laws, § 7, 117, 131; *Stowel v. Zouch*, 1 Plow. 353 a, 364; *Northwestern Railway v. McMichael*, supra at p. 124.

² *Hook v. Donaldson*, 9 Lea, 56, 59; *Crymes v. Day*, 1 Bailey, 320; *Tate v. Tate*, 1 Dev. & Bat. Eq. 22; *Mears v. Bickford*, 55 Maine, 528; *Spencer v. Carr*, 45 N. Y. 406, 410; *De Levillain v. Evans*, 39 Cal. 120; *Knotts v. Stearns*, 91 U. S. 638; *McCloskey v. Cyphert*, 3 Casey, Pa. 220; *Taylor v. Mechanics Savings Bank*, 97 Mass. 345; *Harris v. Musgrove*, 59 Texas, 401.

³ *Skinner v. Maxwell*, 66 N. C. 45.

⁴ *Hunter v. Westbrook*, 2 Car. & P. 578.

⁵ *Magee v. Magee*, 65 Ill. 255; *Mears v. Bickford*, 55 Maine, 528; *Taylor v.*

Mechanics Bank, 97 Mass. 345; *Caughy v. Smith*, 50 Barb. 351.

⁶ *Brown v. The State*, 42 Ala. 540, 542.

⁷ *Perkins v. Wright*, 37 Ind. 27.

⁸ 2 Bishop Crim. Law, § 789.

⁹ Ante, § 904, 905, 917.

¹⁰ *Dunton v. Brown*, 31 Mich. 182.

¹¹ *Irvine v. Irvine*, 9 Wal. 617; *Spencer v. Carr*, 45 N. Y. 406; *Abbot v. Parsons*, 3 Bur. 1794, 1 W. Bl. 575; 2 Kent Com. 236; *Dixon v. Merritt*, 21 Minn. 196.

¹² *Baker v. Lovett*, 6 Mass. 78.

¹³ *Young v. Bell*, 1 Cranch C. C. 342; *Buzzell v. Bennett*, 2 Cal. 101; *Wright v. Steele*, 2 N. H. 51; *Reed v. Batchelder*, 1 Met. 559; *Earle v. Reed*, 10 Met. 387; *Baldwin v. Rosier*, 1 McCrary, 384;

exchanges¹ and sales² of property; his promises to marry,³ to go as a mariner on a whaling voyage,⁴ to work on land,⁵ and multitudes of others which it would be needless to specify.⁶ Nor is it material whether the form of the undertaking is a bond, deed, or other specialty, or an agreement not under seal; all being equally voidable.⁷

§ 926. **Infant Feme Covert.** — The deed of a married infant is, under the common-law rules, void, not voidable;⁸ but this is because of her coverture, not her infancy. In most of our States, wives have statutory authority to convey their lands by deed executed jointly with their husbands; or, in some of them, alone; in which circumstances, an infant *feme covert's* deed is, the disability of coverture being thus removed, voidable.⁹

§ 927. **Executed.** — The infant's executed voidable contract, like one induced by fraud,¹⁰ vests the defeasible interest in the other party;¹¹ for example, his deed of lands transmits

Everson v. Carpenter, 17 Wend. 419; Goodsell v. Myers, 3 Wend. 479. But see Alsop v. Todd, 2 Root, 105; Maples v. Wightman, 4 Conn. 376; Beeler v. Young, 1 Bibb, 519; Tandy v. Master-son, 1 Bibb, 330.

¹ Williams v. Brown, 34 Maine, 594; Grace v. Hale, 2 Humph. 27.

² Baker v. Lovett, 6 Mass. 78; Edgerton v. Wolf, 6 Gray, 453; Stafford v. Roof, 9 Cow. 626.

³ Hunt v. Peake, 5 Cow. 475; Cannon v. Alsbury, 1 A. K. Mar. 76; Wil- lard v. Stone, 7 Cow. 22; Warwick v. Cooper, 5 Sneed, Tenn. 659.

⁴ Vent v. Osgood, 19 Pick. 572.

⁵ Judkins v. Walker, 17 Maine, 38; Lowe v. Sinklear, 27 Misso. 308; Thom- as v. Dike, 11 Vt. 273; Hoxie v. Lin- coln, 25 Vt. 206; Francis v. Felmit, 4 Dev. & Bat. 498.

⁶ For example, West v. Penny, 16 Ala. 186; Haynes v. Slack, 32 Missis. 193; Patchin v. Cromach, 13 Vt. 330; Williams v. Moor, 11 M. & W. 256; Holt v. Holt, 59 Maine, 464.

⁷ Weaver v. Jones, 24 Ala. 420; Par- sons v. Hill, 8 Misso. 135; Mustard v.

Wohlford, 15 Grat. 329; Jenkins v. Jen- kins, 12 Iowa, 195; Slaughter v. Cun- ningham, 24 Ala. 260; Harrod v. Myers, 21 Ark. 592; Wallace v. Lewis, 4 Har- ring. Del. 75; Moore v. Abernathy, 7 Blackf. 442; Johnson v. Rockwell, 12 Ind. 76; Chapman v. Chapman, 13 Ind. 396; Lowe v. Gist, 5 Har. & J. 106, note; Boston Bank v. Chamberlin, 15 Mass. 220; Kendall v. Lawrence, 22 Pick. 540; Bool v. Mix, 17 Wend. 119; Cook v. Toumbs, 36 Missis. 685; Fer- guson v. Bell, 17 Misso. 347; Cummings v. Powell, 8 Texas, 80; Fant v. Cath- cart, 8 Ala. 725; Bingham v. Barley, 55 Texas, 281; Eureka Co. v. Edwards, 71 Ala. 248; Allen v. Poole, 54 Missis. 323.

⁸ Mackey v. Proctor, 12 B. Monr. 433; Magee v. Welsh, 18 Cal. 155; Schrader v. Decker, 9 Barr, 14; Cronise v. Clark, 4 Md. Ch. 403; Chandler v. McKinney, 6 Mich. 217; Adams v. Ross, 1 Vroom, 505.

⁹ 2 Bishop Mar. Women, § 515, 516.

¹⁰ Ante, § 672.

¹¹ Ante, § 618.

the title,¹ and so does his sale of personalty when accompanied by the necessary delivery.² Now,—

§ 928. **Sale of Voidable to Third Person.**—If the party who is thus invested with the voidable interest sells it—for example, sells land which was the infant's—to a third person who is not aware of the infancy, does such purchaser take an absolute title, as in the case of fraud already explained?³ If he does, the way to strip an infant is easy, and the law's protection is valueless. There are cases which hold that the infant may have back again his real estate from an innocent third person, and so much indeed appears to be established;⁴ but perhaps he cannot thus have again, from such third person, every kind of property.⁵

V. *The Infant's Void Contracts.*

§ 929. **In no Event beneficial.**—The foundation of this subtitle is the doctrine, formerly held by all the courts, yet now discarded by some⁶ and retained by others, that any contract of the infant not in any event possible to be for his benefit is in law absolutely void.⁷ Though this doctrine is in some cases found to be a little difficult of application, there occurs to the writer no just reason why it should not be retained, and applied where the court can see that the result will be certainly right. If, in a particular instance, it is absolutely plain that, whatever transpires, the interests of the infant will compel him to disaffirm the contract when he arrives at his majority or before, thus rendering it in law void from

¹ *Irvine v. Irvine*, 9 Wal. 617; *Worcester v. Eaton*, 13 Mass. 371, 375.

² *Fonda v. Van Horne*, 15 Wend. 631; *Stafford v. Roof*, 9 Cow. 626.

³ *Ante*, § 672-674, 728.

⁴ *Myers v. Sanders*, 7 Dana, 506, 521; *Somers v. Pumphrey*, 24 Ind. 231, 239; *Moore v. Abernathy*, 7 Blackf. 442; *Hovey v. Hobson*, 53 Maine, 451, 456; *Dunbar v. Todd*, 6 Johns. 257; *Hill v. Anderson*, 5 Sm. & M. 216, 224. See *Black v. Hills*, 36 Ill. 376.

⁵ *Welch v. Welch*, 103 Mass. 562; *Frazier v. Massey*, 14 Ind. 382; *Nightingale v. Withington*, 15 Mass. 272.

⁶ *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Fetrow v. Wiseman*, 40 Ind. 148; *Flexner v. Dickerson*, 72 Ala. 318, 322.

⁷ *Ante*, § 917; *Robinson v. Weeks*, 56 Maine, 102; *Lumsden's Case*, Law Rep. 4 Ch. Ap. 31, 33, 34; *Owen v. Long*, 112 Mass. 403, 404; *Swafford v. Ferguson*, 3 Lea, 292; *Oliver v. Houdlet*, 13 Mass. 237, 239.

the beginning,¹ surely it is but a beneficent administration of justice for the court to speak now the truth the utterance of which can only be postponed, and prevent the losses which may arise from delay. At all events, it is submitted that the law is full of absurdities which the rule of *stare decisis* can better be disregarded to correct than this doctrine, which is, at the worst, but superfluous. We shall now consider it in reference to particular questions; thus,—

§ 930. **Appointing Attorney or Agent.**—It is by all, even including those who deny the general doctrine of this subtitle, held that, subject to an exception about to be stated, the infant's power of attorney under seal,² or his authorization of an attorney in whatever form to appear for him in court,³ or any letter of attorney not conveying an interest,⁴ is void. And some of the cases seem to extend the doctrine to every appointment of an agent, whether under seal or not; so that the infant can do no valid act by agent.⁵ But other authorities permit his acting by agent or attorney, within limits not well defined, yet including the signing of a promissory note for example, when the authorization is not under seal.⁶ And, as an exception universal, his power of attorney to one to receive seisin of an estate conveyed to him—an act manifestly for his benefit—is not void but voidable.⁷ So are the authorities. In reason, we shall find it difficult to see why an infant, a person of imperfect capacity, cannot as validly act through another whose capacity has become per-

¹ French v. McAndrew, 61 Missis. 187.

² Met. Con. 41, 42; Waples v. Hastings, 3 Harring. Del. 403; Roof v. Stafford, 7 Cow. 179, 180; Wamble v. Foote, 2 Dak. 1.

³ Bennett v. Davis, 6 Cow. 393; Oliver v. Woodroffe, 4 M. & W. 650. See Anonymous, 3 Mod. 248.

⁴ Lawrence v. McArter, 10 Ohio, 37, 42; Saunderson v. Marr, 1 H. Bl. 75.

⁵ Thomas v. Roberts, 16 M. & W. 778; Tapley v. McGee, 6 Ind. 56; Robbins v. Mount, 4 Rob. N. Y. 553; Armitage v. Widoe, 36 Mich. 124; Flexner

v. Dickerson, 72 Ala. 318, 322; Trueblood v. Trueblood, 8 Ind. 195.

⁶ Whitney v. Dutch, 14 Mass. 457; Pottenger v. Steuart, 3 Har. & J. 347; Ward v. The Little Red, 8 Misso. 358; Hall v. Jones, 21 Md. 439; Alsworth v. Cordtz, 31 Missis. 32; Belton v. Briggs, 4 Des. 465; Hastings v. Dollarhide, 24 Cal. 195; Towle v. Dresser, 73 Maine, 252.

⁷ Met. Con. 41, 42, citing Bro. Abr. Faires, 31; 1 Rol. Abr. 730; Abbot v. Parsons, 3 Bur. 1794, 1808; 1 Woodderson, 400.

fectured by age, and therefore presumably furnishing a sort of protection, as by his sole and unguarded self.¹

§ 931. **Unequal.** — A one-sided agreement, by which the infant is to work a certain time for wages, yet the master may stop the work at pleasure, and retain the wages during the stoppage, — manifestly not for the advantage of the infant, — has been deemed void.² Again, —

§ 932. **Gift.** — Probably not every gift by the infant is void; for there may be circumstances in which it will be to his benefit, so that he may even be chargeable as for a necessary with the price of an article which he is to give away.³ But a conveyance of an infant's land without consideration was held to be void.⁴

§ 933. **Suretyship.** — By some, the infant's contract of suretyship is deemed void, as not possibly beneficial to him.⁵ Others hold it to be voidable.⁶

§ 934. **Obligation with Penalty.** — Another form of contract, not deemed possibly beneficial to the infant and therefore void, is an obligation with a penalty.⁷

§ 935. **Concerning the Authorities.** — As to these several propositions, with the exception of the one about the infant's acting by agent, some have attempted to explain away the authorities by showing that the result would be the same on the theory that the contract was voidable. If there were affirmative authorities, as there are not, to the several propositions that these contracts are not void, such a method of reconciling apparent conflicts in the cases would be judicious. But where the courts have from the earliest times uniformly assigned a particular ground for a conclusion always arrived at, it is but the common course, in the absence of anything conflicting with such ground, to continue to accept it as the law.

¹ And see *Whitney v. Dutch*, 14 Mass. 457, 463; *Bool v. Mix*, 17 Wend. 119, 131.

² *Reg. v. Lord*, 12 Q. B. 757.

³ *Ryder v. Wombwell*, Law Rep. 3 Ex. 90, 4 Ex. 32.

⁴ *Swafford v. Ferguson*, 3 Lea, 292. See *Oxley v. Tryon*, 25 Iowa, 955; *Perrison v. Chase*, 37 Vt. 647.

⁵ *Maples v. Wightman*, 4 Conn. 376.

⁶ *Owen v. Long*, 112 Mass. 403, 404; *Fetrow v. Wiseman*, 40 Ind. 148; *Harner v. Dipple*, 31 Ohio State, 72; *Williams v. Harrison*, 11 S. C. 412.

⁷ *Baylis v. Dineley*, 3 M. & S. 477; *Fisher v. Mowbray*, 8 East, 330.

VI. *Affirmance and Disaffirmance of the Voidable Contract.*¹

§ 936. **By whom.** — The privilege of infancy is personal. During the infant's life, he only can avail himself of it; after his death, only his heir or administrator.² Neither his guardian can, during minority;³ nor, even when he becomes of age, can his creditor.⁴ But, as just intimated, his executor or administrator,⁵ or his heir,⁶ succeeds on his death to his right of avoiding his contract. Or, when he has pleaded his infancy, an adult, whose rights have been thereby affected, can do the same.⁷

§ 937. **Time and Manner in General.** — The cases are obscure and discordant as to what is an avoidance and what a confirmation, and at what time either act should be performed. There is a difference between an executory contract and an executed one;⁸ the latter, we have seen,⁹ vests in the other party whatever interest the infant undertakes to transmit, therefore it is good until avoided. The avoidance may be after he attains his majority; or, on principle, and partly on the authorities, before. When, after majority, he has affirmed his contract, he is too late to disaffirm. The disaffirmance must be by some act distinct and positive, leaving no doubt of the intent. Quite otherwise is it with the executory contract.¹⁰ If the infant is sued on it, whether before or after becoming of age, and if he has not since his majority confirmed it, the infancy is a perfect defence; nor

¹ Compare with ante, § 809-866.

² Ante, § 905; 2 Inst. 483; Hill v. Keyes, 10 Allen, 258, 260; Hartness v. Thompson, 5 Johns. 160; Van Bramer v. Cooper, 2 Johns. 279; Brown v. Caldwell, 10 S. & R. 114; Rose v. Daniel, 3 Brev. 438; Worcester v. Eaton, 13 Mass. 371, 375; Coan v. Bowles, 1 Show. 165, 171; Baldwin v. Rosier, 1 McCrary, 384; Holmes v. Rice, 45 Mich. 142; Beardsley v. Hotchkiss, 96 N. Y. 201; Bozeman v. Browning, 31 Ark. 364.

³ Oliver v. Houdlet, 13 Mass. 237, 240; Irvine v. Crockett, 4 Bibb, 437.

⁴ Kendall v. Lawrence, 22 Pick. 540, 543.

⁵ Smith v. Mayo, 9 Mass. 62; Hussey v. Jewett, 9 Mass. 100; Martin v. Mayo, 10 Mass. 137, 139; Jefford v. Ringgold, 6 Ala. 544; Counts v. Bates, Harper, 464.

⁶ Whittingham's Case, 8 Co. 42 b; Veal v. Fortson, 57 Texas, 482, 487.

⁷ Shrock v. Crowl, 83 Ind. 243.

⁸ Ante, § 919-921, 927.

⁹ Ante, § 927.

¹⁰ Eureka Co. v. Edwards, 71 Ala. 248.

does it ever bind him except upon such confirmation. The nature of the confirming act, and the time for it, will vary with the sort of case. Should the adjudications ever be reconciled, and those which cannot be brought into line with the rest overruled, doubtless these distinctions indicate the way in which it will be done.¹ To call to mind some particulars, and partly to restate, —

§ 938. **Before or after Majority.** — We have just seen that, of necessity, the infant may avoid his executory contract as well during infancy as afterward; and ordinarily it is the same of his executed contract.² But there is a distinction sometimes taken. All hold that, during minority, he may rescind his sale or mortgage of any chattel.³ But where he has conveyed away his real estate by deed, some and perhaps most courts permit him simply to re-enter and take the rents and profits, yet not finally to disaffirm the deed until he becomes of age.⁴ A disaffirmance, though made while he is yet

¹ 1 Chit. Con. 11th Am. ed. 218, 219, and notes; *Irvine v. Irvine*, 9 Wal. 617; *Skinner v. Maxwell*, 66 N. C. 45; *Spencer v. Carr*, 45 N. Y. 406; *Shropshire v. Burns*, 46 Ala. 108; *Robinson v. Weeks*, 56 Maine, 102; *Tucker v. Moreland*, 10 Pet. 58; *Judkins v. Walker*, 17 Maine, 38; *Lowe v. Sinklear*, 27 Misso. 308; *Thomas v. Dike*, 11 Vt. 273; *Hoxie v. Lincoln*, 25 Vt. 206; *Abbot v. Parsons*, 3 Bur. 1794, 1804; *Harris v. Cannon*, 6 Ga. 382; *Harrison v. Adcock*, 8 Ga. 68; *Phillips v. Green*, 3 A. K. Mar. 7; *Derrick v. Kennedy*, 4 Port. 41; *Jefford v. Ringgold*, 6 Ala. 544; *Thomasson v. Boyd*, 13 Ala. 419; *Phillips v. Green*, 5 T. B. Monr. 344; *Murray v. Shanklin*, 4 Dev. & Bat. 289; *Smith v. Mayo*, 9 Mass. 62, 64; *Ford v. Phillips*, 1 Pick. 202; *Thompson v. Lay*, 4 Pick. 48; *Proctor v. Sears*, 4 Allen, 95; *Wilcox v. Roath*, 12 Conn. 550; *Goodsell v. Myers*, 3 Wend. 479; *Edgerly v. Shaw*, 5 Fost. N. H. 514; *Millard v. Hewlett*, 19 Wend. 301; *Armfield v. Tate*, 7 Ire. 258; *Reed v. Boshcars*, 4 Sneed, Tenn. 118; *Buckner v. Smith*, 1 Wash. Va. 296; *Stokes v. Brown*, 4 Chand. 39;

Whitney v. Dutch, 14 Mass. 457, 461; *Orvis v. Kimball*, 3 N. H. 314; *Hoit v. Underhill*, 10 N. H. 220; *Emmons v. Murray*, 16 N. H. 385; *Richardson v. Boright*, 9 Vt. 368; *Wright v. Germain*, 21 Iowa, 585; *Deason v. Boyd*, 1 Dana, 45; and multitudes of other cases, in absolute discord.

² *Vent v. Osgood*, 19 Pick. 572; *Heath v. West*, 6 Fost. N. H. 191; *Carr v. Clough*, 6 Fost. N. H. 280; *Grace v. Hale*, 2 Humph. 27; *Shipman v. Horton*, 17 Conn. 481; *Walker v. Ellis*, 12 Ill. 470; *Heath v. West*, 8 Fost. N. H. 101; under the Iowa code, *Childs v. Dobbins*, 55 Iowa, 205; *Murphy v. Johnson*, 45 Iowa, 57; *Beller v. Marchant*, 30 Iowa, 350.

³ *Towle v. Dresser*, 73 Maine, 252, 256; *Miller v. Smith*, 26 Minn. 248; *Betts v. Carroll*, 6 Misso. Ap. 518; *Dunton v. Brown*, 31 Mich. 182; *Chapin v. Shafer*, 49 N. Y. 407, 412; *Stafford v. Roof*, 9 Cow. 626, 628; *Indianapolis Chair Manuf. Co. v. Wilcox*, 59 Ind. 429.

⁴ *Abbot v. Parsons*, 3 Bur. 1794, 1808; *Stafford v. Roof*, *supra*, at p.

an infant, is conclusive; for it revests the property in him, and he can now no more than in the first instance transmit the title to the other party without his consent.¹ It is submitted that, in principle, the doctrine which all hold to govern personal property should be applied also to real. When an infant has improvidently conveyed away his lands, to refuse him the privilege of owning them again until he is twenty-one, yet to permit him to occupy them and take the profits, and finally at his majority to make the sale good or ill as he pleases, is to throw into a tangle both his rights and those of his vendee with nothing but detriment to either.

§ 939. **Disaffirming All or None.** — The infant cannot avoid part of his contract and affirm a part; his act must cover the whole or none.² For example, if he has bought goods, and given a mortgage back to secure the pay, he cannot affirm the sale and disaffirm the mortgage.³ Hence, —

§ 940. **Give back.** — An infant rescinding an executed contract should in general restore what he received under it.⁴ And after the rescission by him of any contract executory or executed, if there is in his possession any article which he had from the other party as a consideration for it, such party may take the article, or may recover it by process of law.⁵ But the right of rescission by the infant is superior to the right of the adult to have back the thing; so that, if the former has parted with it and has it not, he may still rescind, though he does not return either the thing or its equivalent.⁶

628; *Bool v. Mix*, 17 Wend. 119, 132; *McCormic v. Leggett*, 8 Jones, N. C. 425; *Welch v. Bunce*, 83 Ind. 382; *Dunton v. Brown*, 31 Mich. 182.

¹ *Edgerton v. Wolf*, 6 Gray, 453, 457, 458.

² Ante, § 679, 836.

³ *Curtiss v. McDougal*, 26 Ohio State, 66; *Heath v. West*, 8 Fost. N. H. 101; *Weed v. Beebe*, 21 Vt. 495; *Young v. McKee*, 13 Mich. 552.

⁴ Ante, § 679, 818, 919, 921; *Smith v. Evans*, 5 Humph. 70; *Strain v. Wright*, 7 Ga. 568; *Hill v. Anderson*, 5 Sm. & M. 216; *Kitchen v. Lee*, 11 Paige, 107; *Womack v. Womack*, 8

Texas, 397; *Pursley v. Hays*, 17 Iowa, 310; *Stuart v. Baker*, 17 Texas, 417; *Carr v. Clough*, 6 Fost. N. H. 280.

⁵ *Badger v. Phinney*, 15 Mass. 359; *Carpenter v. Carpenter*, 45 Ind. 142; *Bennett v. McLaughlin*, 13 Bradw. 349; *Skinner v. Maxwell*, 66 N. C. 45.

⁶ *Chandler v. Simmons*, 97 Mass. 508, 514; *Manning v. Johnson*, 26 Ala. 446; *Dill v. Bowen*, 54 Ind. 204; *Brandon v. Brown*, 106 Ill. 519; *Green v. Green*, 69 N. Y. 553, 556, 557; *Eureka Co. v. Edwards*, 71 Ala. 248; *Brantley v. Wolf*, 60 Missis. 420. See ante, § 920, 921.

§ 941. **Affirming and Disaffirming Executed.** — There can be no ratification of any contract during minority; ¹ for, like the contract itself, it would be voidable and so work no change therein. When the infant has reached his majority he can, without any fresh consideration, ² ratify his contract, and then a disaffirmance will come too late. ³ If he receives a promissory note for work done, and does not offer to return it for eight months after he becomes of age; ⁴ or, if he buys goods on credit, then after becoming of age retains and uses them for an unreasonable time without doing anything in disaffirmance; ⁵ or, if he takes a deed of land, giving back a mortgage, then continues in possession after reaching his majority; ⁶ or, if, after majority, he continues in the possession of an estate which had been leased to him, ⁷ — in these and other like cases he confirms the transaction, and he cannot afterward recede therefrom.

§ 942. **Continued — (Estate conveyed away).** — If, during infancy, the infant or his guardian had conveyed away an estate, a receipt of the purchase money after majority will confirm the sale. ⁸ Or perhaps, or in some circumstances, if he retains or disposes of the consideration after majority, he does thereby the same thing; ⁹ but this sort of case should not be confounded with one wherein, while a minor, he parted with the consideration, so that its return is not necessary in a disaffirmance. ¹⁰ A fresh deed, ¹¹ or a distinct acknowledgment in

¹ *Black v. Hills*, 36 Ill. 376.

² *Ante*, § 81, 94–98, 620, 683, 804, 806, 829; post, § 943.

³ *Ante*, § 784, 844; *Conaway v. Shelton*, 3 Ind. 334; *Kennedy v. Doyle*, 10 Allen, 161; *Henry v. Root*, 33 N. Y. 526; *Southerton v. Whitlock*, 1 Stra. 690.

⁴ *Delano v. Blake*, 11 Wend. 85.

⁵ *Boyden v. Boyden*, 9 Met. 519.

⁶ *Hubbard v. Cummings*, 1 Greenl. 11; *Henry v. Root*, 33 N. Y. 526; *Dana v. Coombs*, 6 Greenl. 89. And see *Barnaby v. Barnaby*, 1 Pick. 221.

⁷ 1 Chit. Con. 11th Am. ed. 217.

⁸ *Parmele v. McGinty*, 52 Missis. 475; *Douglas v. Bennett*, 51 Missis.

680. Compare with *Self v. Taylor*, 33 La. An. 769; *Highley v. Barron*, 49 Misso. 103.

⁹ *Brantley v. Wolf*, 60 Missis. 420; *Bingham v. Barley*, 55 Texas, 281. Compare with *Benham v. Bishop*, 9 Conn. 330.

¹⁰ *Ante*, § 940; *Green v. Green*, 69 N. Y. 553; *Miles v. Lingerman*, 24 Ind. 385; *Reynolds v. McCurry*, 100 Ill. 356; *Dawson v. Helmes*, 30 Minn. 107; *Richardson v. Pate*, 93 Ind. 423.

¹¹ *Phillips v. Green*, 5 T. B. Monr. 344; *Murray v. Shanklin*, 4 Dev. & Bat. 289.

another deed,¹ may constitute a ratification; and so may any other act or conduct, when such as necessarily to exclude the contrary interpretation.² But mere silence, with no action taken, is different. And, by a part of the courts, it is held not to preclude a disaffirmance so long as the Statute of Limitations has not run against the right.³ Other courts hold that mere delay may amount to an affirmance; resulting in the doctrine that the disaffirmance must be within a reasonable time, which will vary with the circumstances,⁴ after majority.⁵ A conveyance — under the formalities which the particular case, in the particular State, requires — of the thing, whether lands or goods, to another person, is a common and adequate form of disaffirmance.⁶ So also, as to lands, is a writ of entry.⁷ Or a mere entry and declaration appear to be enough;⁸ and various other obvious methods will suffice.⁹

§ 943. **Confirmation of Executory.** — It has already been

¹ *Losey v. Bond*, 94 Ind. 67.

² *Emmons v. Murray*, 16 N. H. 385; *Rensselaer v. Whitlock*, 1 Johns. Cas. 213, 215, 219; *Lynde v. Budd*, 2 Paige, 191; *Kline v. Beebe*, 6 Conn. 494; *Hartman v. Kendall*, 4 Ind. 403; *Wheaton v. East*, 5 Yerg. 41; *Summers v. Wilson*, 2 Coldw. 469; *Houser v. Reynolds*, 1 Hayw. 143.

³ *Urban v. Grimes*, 2 Grant, Pa. 96; *Voorhies v. Voorhies*, 24 Barb. 150; *Hughes v. Watson*, 10 Ohio, 127; *Wallace v. Latham*, 52 Missis. 291, 297; *Allen v. Poole*, 54 Missis. 323. And see 1 Pars. Con. 325, 326.

⁴ *Thompson v. Strickland*, 52 Missis. 574; *Sims v. Bardoner*, 86 Ind. 87; *Davis v. Dudley*, 70 Maine, 236; *Terry v. McClintock*, 41 Mich. 492; *Hoover v. Kinsey Plough Co.* 55 Iowa, 668.

⁵ *Long v. Williams*, 74 Ind. 115; *Nathans v. Arkwright*, 66 Ga. 179; *Jones v. Jones*, 46 Iowa, 466; *Green v. Wilding*, 59 Iowa, 679; it is so by statute in Iowa, *Weaver v. Carpenter*, 42 Iowa, 343; *Scranton v. Stewart*, 52 Ind. 68; *Goodnow v. Empire Lumber Co.* 31 Minn. 468; *Jamison v. Smith*, 35 La. An. 609; *Miller v. Smith*, 26 Minn. 248; *Wilson v. Branch*, 77 Va. 65.

And see *Stringer v. Northwestern Mut. Life Ins. Co.* 82 Ind. 100; *Green v. Green*, 69 N. Y. 553; *Hull v. Jones*, 10 Lea, 100; *Richardson v. Pate*, 93 Ind. 423; *Sims v. Smith*, 86 Ind. 577; *Blankenship v. Stout*, 25 Ill. 132; *Cole v. Pennoyer*, 14 Ill. 158.

⁶ *Wallace v. Carpenter*, 11 Johns. 539; *Brayton v. Burchin*, 14 Johns. 124; *Tucker v. Moreland*, 10 Pet. 58; *Cresinger v. Welch*, 15 Ohio, 156; *Harris v. Cannon*, 6 Ga. 382; *Harrison v. Adcock*, 8 Ga. 68; *Pitcher v. Laycock*, 7 Ind. 398; *Peterson v. Laik*, 24 Misso. 541; *McGan v. Marshall*, 7 Humph. 121; *Dawson v. Helmes*, 30 Minn. 107; *Riggs v. Fisk*, 64 Ind. 100; *Dixon v. Merritt*, 21 Minn. 196. And see *Slaughter v. Cunningham*, 24 Ala. 260; *Williams v. Norris*, 2 Litt. 157; *Leitensdorfer v. Hempstead*, 18 Misso. 269.

⁷ *Chadbourne v. Rackliff*, 30 Maine, 354.

⁸ *Bool v. Mix*, 17 Wend. 119.

⁹ *McGill v. Woodward*, 3 Brev. 401; *Voorhies v. Voorhies*, 24 Barb. 150; *Graves v. Hickman*, 59 Texas, 381; *French v. McAndrew*, 61 Missis. 187; *Willie v. Brooks*, 45 Missis. 542.

shown that no disaffirmance of an executory contract is necessary, and that it will bind the infant only when after majority he has confirmed it.¹ But the confirmation requires only a promise, no fresh consideration need be added.² And there must be either an express promise, made to the party or his agent, or its equivalent in implication, corresponding to what is required in a new contract.³ Any form of words which may be construed as amounting to such promise will suffice;⁴ a mere acknowledgment of indebtedness will not,⁵ nor will a part payment,⁶ nor will a promise to a stranger.⁷ Nor is the retention of the consideration after becoming of age a ratification.⁸ A conditional promise will be deemed such, yet only on proof that the condition has been fulfilled.⁹ A continuing contract may be treated as confirmed where the infant simply goes on with its performance, without notice, after reaching his majority.¹⁰

§ 944. *Further as to which.* — The infant's ratification renders his contract good from the beginning.¹¹ Therefore the suit against him may be based on his original promise,¹² but it must not be commenced before the ratification was made.¹³ In a few of our States, statutes, following English

¹ Ante, § 920, 937; *Stone v. Wythipol*, Cro. Eliz. 126.

² Ante, § 941; *Edmond's Case*, 3 Leon. 164; *Barton's Case*, 4 Leon. 5.

³ *Goodsell v. Myers*, 3 Wend. 479; *Millard v. Hewlett*, 19 Wend. 301; *Turner v. Gaither*, 83 N. C. 357; *Gay v. Ballou*, 4 Wend. 403; *Orvis v. Kimball*, 3 N. H. 314; *Hoit v. Underhill*, 10 N. H. 220; *Smith v. Kelley*, 13 Met. 309.

⁴ *Martin v. Mayo*, 10 Mass. 137; *Barnaby v. Barnaby*, 1 Pick. 221; *Bobo v. Hansell*, 2 Bailey, 114; *Whitney v. Dutch*, 14 Mass. 457.

⁵ *Smith v. Mayo*, 9 Mass. 62, 64; *Ford v. Phillips*, 1 Pick. 202; *Thompson v. Lay*, 4 Pick. 48; *Proctor v. Sears*, 4 Allen, 95; *Wilcox v. Roath*, 12 Conn. 550; *Edgerly v. Shaw*, 5 Fost. N. H. 514; *Alexander v. Hutcheson*, 2 Hawks, 535; *Reed v. Boshears*, 4 Sneed, Tenn.

118; *Armfield v. Tate*, 7 Ire. 258; *Conklin v. Ogborn*, 7 Ind. 553.

⁶ *Catlin v. Haddox*, 49 Conn. 492.

⁷ *Bigelow v. Grannis*, 2 Hill, N. Y. 120; *Hoit v. Underhill*, 9 N. H. 436.

⁸ *Benham v. Bishop*, 9 Conn. 330; *Thing v. Libbey*, 16 Maine, 55.

⁹ *Chandler v. Glover*, 8 Casey, Pa. 509; *Cole v. Saxby*, 3 Esp. 159; *Davies v. Smith*, 4 Esp. 36; *Thompson v. Lay*, 4 Pick. 48; *Everson v. Carpenter*, 17 Wend. 419.

¹⁰ *Goode v. Harrison*, 5 B. & Ald. 147; *Miller v. Sims*, 2 Hill, S. C. 479; *Tobey v. Wood*, 123 Mass. 88; *Holmes v. Blogg*, 8 Taunt. 35.

¹¹ Ante, § 849.

¹² *Whitney v. Dutch*, 14 Mass. 457, 461; *West v. Penny*, 16 Ala. 186. And see *Jackson v. Mayo*, 11 Mass. 147.

¹³ *Ford v. Phillips*, 1 Pick. 202; *Mer-*

legislation,¹ require such affirmance to be in writing.² Aside from a statute of this sort, the infant's bond with a penalty, being void and not voidable,³ cannot be ratified by parol;⁴ for a void instrument does not admit of ratification.⁵ Yet, in principle, and it is believed equally on authority, the infant's oral confirmation of either his voidable specialty or his voidable simple contract in writing, where the law has made a seal or writing necessary, is good.⁶ The principle is, that the ratification is a waiver of the right, which the law has given, to rely on the defence of infancy; such waiver is a thing quite separate from the contract itself; and, under the rules of the unwritten law, it need never, to be effectual, be under seal, or in writing, or founded on a consideration.⁷

§ 945. **Other Questions**, — relating to the present topics, are solved by the expositions in other parts of this volume; as, in the chapters on Law and Fact,⁸ on Void and Voidable,⁹ on Election and Waiver,¹⁰ on Rescission,¹¹ and on Ratification and Release.¹²

§ 946. *The Doctrine of this Chapter restated.*

Infancy continues until the age of twenty-one years; which, as the period of freedom from the restraints required for nurture and education, is necessarily arbitrary, yet on the whole just. In natural reason, an intelligent young man who lacks a day only of being twenty-one should not stand on the same footing, as to the power of contract, with a boy of four. Nor in all respects does he in law. Yet if, at these

riam v. Wilkins, 6 N. H. 432; Thing v. Libbey, 16 Maine, 55.

¹ 9 Geo. 4, c. 14, § 5 (A. D. 1828), afterward superseded by 37 & 38 Vict. c. 62, § 2, nearly to the same effect, and expressly repealed by 38 & 39 Vict. c. 66; Hartley v. Wharton, 11 A. & E. 934; Ex parte Kibble, Law Rep. 10 Ch. Ap. 373.

² Stern v. Freeman, 4 Met. Ky. 309; Thurlow v. Gilmore, 40 Maine, 378.

³ Ante, § 934.

⁴ Baylis v. Dineley, 3 M. & S. 477.

⁵ Ante, § 614, 846.

⁶ Houser v. Reynolds, 1 Hayw. 143; Little v. Duncan, 9 Rich. 55; Irvine v. Irvine, 9 Wal. 617.

⁷ Ante, § 94-98, 793, 804.

⁸ Ante, § 461 et seq.

⁹ Ante, § 610 et seq.

¹⁰ Ante, § 777 et seq.

¹¹ Ante, § 809 et seq.

¹² Ante, § 843 et seq.

extremes of age, we can distinguish between the two classes of infants as to their capacity for contracting, and point out some of the differences, we shall find the books inadequate guides to others; nor do they show us, with any great minuteness, as we draw the extremes together, at what periods, and how much, and how, the differences dwindle, and where the two blend. In the criminal law, one under seven years cannot become punishable, and one over fourteen is as liable to punishment as an adult, while between those ages evidence of actual capacity may be submitted to the tribunal.¹ In the matrimonial law, a boy and girl of seven may enter into such an "inchoate and imperfect marriage" that, if she becomes a widow at nine, the common law will give her dower; and a boy of fourteen and a girl of twelve may marry as effectually as at their majority, — ages which have been varied by statutes in some of our States.² A boy under fourteen, as the law is generally held, cannot become legally guilty of rape, whatever ravishment he may in fact perpetrate.³ But refinements like these have not been carried into the ordinary law of contracts. Actual consent to the thing which constitutes a crime is required in the criminal law;⁴ yet, in various circumstances, the law will create a contract between persons who do not in fact concur therein, and even whose wills affirmatively oppose.⁵ In this way infants often have contracts imposed upon them where they could not bind themselves.⁶ Yet not often will the simple assent of their wills hold them.⁷ A contract which cannot be beneficial to the infant is void; that is, it transfers nothing, and it cannot be enforced against either party. One which may be beneficial, even though the court cannot foresee whether it will be or not, binds the adult party, but the infant may avoid it or not at his election. Hence it is termed voidable. Practically, most contracts of infants are found to be of the latter sort.

¹ 1 Bishop Crim. Law, § 368 et seq.

² 1 Bishop Mar. & Div. § 143-153.

³ 2 Bishop Crim. Law, § 1117.

⁴ 1 *Ib.* § 287-291, 301-310, 327, 346.

⁵ *Ante*, § 181 et seq.

⁶ *Ante*, § 906-916.

⁷ *Ante*, § 917-923.

CHAPTER XXXIV.

MARRIED WOMEN.

§ 947. **What for this Chapter.**— The subject of the contracts of married women is too vast to be elucidated in detail in a work like this. We shall, therefore, consider only some of its leading principles, in a manner enabling the reader the better to enter upon its minuter study in other works and in the cases. And the author is the more reconciled to this course from the fact that, in other books of his own, he has already explained the subject in full.¹

§ 948. **Law Imperfect.**— There is no topic which more aptly than this illustrates the universal truth, that human laws are of necessity imperfect, often in their results coming far short of the exact justice which is understood to be meted out by the divine. Marriage is the fundamental institution of society. Every individual marriage, even before children have been added to the family, and especially after, affects the interests of many more persons than the two parties themselves. From which and other reasons, the law does not and should not suffer its dissolution from the mere will of the parties. If divorces are, as it is believed they ought to be, permitted in a few exceptional cases, still it is impossible to devise any statute in the operation of which the bond of marriage will never be wrongfully severed on the one hand, and on the other hand no persons will be compelled to remain in matrimony whom fundamental justice would require to be divorced. And when we descend to the property rights of the respective married parties, we find, if we look carefully

¹ And see ante, § 29, 148, 201, 229, 235, 237, 580, 727, 906, 910.

and considerably, the question still more difficult; though, if we take but superficial views, all will seem plain and easy. For example, one looking at the question superficially might say, that the law of partnership should be extended to husband and wife, thus making the two equal, and burying the supposed superior rights of the husband. But while we have, of late, various legislative experiments made in the interest of equality, it is believed that this one has never been tried. And when we extend our thoughts a little, we discover an insuperable objection to it. The law of partnership puts it in the power of the one partner to ruin the other by improvident or fraudulently-intended contracts; the remedy for which is the absolute right of dissolution, to be exercised by either at pleasure. But to permit the husband or wife to terminate the marriage in the same way would annihilate the institution itself. Another device of the superficial mind, often suggested, yet not hitherto carried into legislation, is for the husband and wife to pass through their married lives absolutely independent of each other in respect of property, the same as though they were not married. But the difficulties of this arrangement would be insurmountable. If the wife spends an afternoon in visiting her mother instead of making jellies, shall the husband bring her into court to determine the abatement to be made from the sum he had promised her for work in keeping his boarding-house? Shall there be a lawsuit to settle the allowance for tending the baby which is partly his and partly hers? If her washing is sent to a laundress, and her clothes had been soiled in part in doing his work and in part in doing her own, and in part in tending the baby of both, shall the judge of a court be employed in instructing the jury how to adjust the account between them? But it is needless to go on with these questions. Gravely as this thing has been proposed by men who have had not a particle of doubt of their own superior wisdom, there is little danger that legislation will ever descend so low in folly as to give statutory form to the idea. The power which makes marriage tolerable, and for the majority desirable, is the mutual love and respect of the parties; the

consequence of which is, that, whatever the law may be, they neither think of its provisions nor care for or attempt to follow them. Hence,—

§ 949. **Law of the Common-law Courts.**—From the early times downward, the law as administered in the common-law courts has made the husband the head of the family, has vested in him a life estate in the wife's realty, and absolute ownership of her personal property in possession, but not of her personal rights in action;¹ has made her incapable of suing or being sued alone, so that he must join or be joined with her in all lawsuits regarding her own effects and debts due to and from her, and her personal rights and wrongs;² has placed him under the duty, whether she brought to him property, or capacity for work, or not, to maintain her;³ has forborne to cast on her the duty of maintaining him, whatever her ability and his necessities;⁴ has vested her earnings in him;⁵ and, as a consequence of the joinder of her husband in her lawsuits, has made him answerable for her ante-nuptial debts, if the suit is carried to judgment during his life, and in like manner answerable for her ante-nuptial and post-nuptial torts.⁶ One of the consequences of all which is, that she can bind herself by no contract, and her formal undertaking is not voidable but void.⁷ Considering that much oftener than otherwise girls on their marriage do not bring valuable estates to their husbands, that the greater part of married people spend most or all of their income in living, and that the law gives to the widow a part of her deceased husband's property, it cannot be said that these provisions of the common law are not as beneficent as any other in the

¹ 1 Bishop Mar. Women, § 62–155, 528–579, 883, 884.

² *Ib.* § 903–913.

³ *Ib.* § 49, 57, 58, 887, 892, 894–897; 1 Bishop Mar. & Div. § 550–581.

⁴ 1 Bishop Mar. Women, § 49, 892.

⁵ *Ib.* § 21, 102, 104, 212–215, 886.

⁶ *Ib.* § 58, 60, 842, 905, 910–912; Miles v. Williams, 10 Mod. 160, 163;

Obrian v. Ram, 3 Mod. 186; Heyward's Case, Sir F. Moore, 761.

⁷ 1 Bishop Mar. Women, § 842; Norris v. Lantz, 18 Md. 260; Lambert v. Atkins, 2 Camp. 272; Morris v. Norfolk, 1 Taunt. 212; Edwards v. Davis, 16 Johns. 281; Rogers v. Higgins, 48 Ill. 211; Hyner v. Dickinson, 32 Ark. 776; Weed Sewing Machine Co. v. Maxwell, 63 Misso. 486; Farrar v. Bessey, 24 Vt. 89.

average case, however hard in exceptional instances they are upon the woman. But equity, administered in the equity tribunals, grew up side by side with the law of the common-law courts. And its rules furnish a remedy for many of the hard cases. Thus, —

§ 950. **Law of the Equity Courts.** — It must be remembered that, wherever the common-law and equity tribunals differ in their rules, those of the latter prevail; and they, and not the former, are the true law of the land. The consequence of which is, that only in part are the doctrines of the last section unwritten law with us. If, then, parties about to be married desire to be governed in their pecuniary affairs by rules different from those set down in the last section, and especially if they wish the woman to retain the ownership of her property and the right to control it, or to retain any other power of contract, the rules of our unwritten law, as administered in the equity tribunals, permit them to express their wish in an ante-nuptial agreement, and it will be given full effect. And, beyond this, equity concedes to the wife, even in the absence of such agreement, a considerable power of contract.¹ The husband's duty to support the wife, and the manner of its enforcement, are fully explained in the author's "Marriage and Divorce;"² the other topics, in his "Married Women."

§ 951. **Statutory Changes.** — In nearly all of our States, and of late in England, there are statutes which, to a greater or less extent, endow the wife, at law, with rights and powers before available to her only in equity. And some of these statutes confer on her something of what neither law nor equity gave her before. At the same time, they pretty generally relieve the husband of the obligation to pay her ante-nuptial debts. The author is not aware that any of them take from him the duty to maintain her, while commonly they

¹ *Freeman v. More*, 1 Bro. P. C. 237; *Gosden v. Tucker*, 6 Munf. 1; *Whitten v. Whitten*, 3 Cush. 191; *Williams v. Maull*, 20 Ala. 721; *Wood v. Warden*, 20 Ohio, 518; *Resor v. Resor*, 9 Ind. 347; *Pinney v. Fellows*, 15 Vt. 525;

Barron v. Barron, 24 Vt. 375; *Butler v. Ricketts*, 11 Iowa, 107; *Blake v. Blake*, 7 Iowa, 46.

² 1 Bishop Mar. & Div. § 550-656 a; 2 *Ib.* § 350-524.

invest her with the ownership of her earnings. Nor do they compel her, under any circumstances, to support him. And, as earnings on the one hand, and support on the other, are ordinarily the principal pecuniary affair of married life, wives have now, in the average case, greatly the advantage over their husbands, if they choose to take what the law gives them. And husband and wife, if in due accord, and mutually inclined to defraud the rest of mankind, have it well in their power to live in wealth, procured, by lawful cheating, from confiding creditors. An unmarried man finds it difficult to transfer to his friend the property with which he ought to pay his debts, because the law is against him. But the trusting husband, who has a loving wife, can so arrange his affairs that all the earnings shall be hers and all the expenses his; whereby, in a short time, his estate is indirectly but effectually transferred to her, while apparently it remains his. He is now in a condition to pile up debts against himself, and fill his wife's hands with money; he refusing to pay the former, and she clinging to the latter. In all which, the law and his rascality are in sweet accord; so that, however great, on the whole, the improvement of modern laws over the former ones, they still illustrate the difficulty, not yet surmounted by legislation, of regulating equitably and justly the pecuniary rights of marriage.

§ 952. **Further Legislative Changes.** — Legislation on this subject has, for many years, been seeking rest and finding none. Probably in not a single State of those which have entered upon it has it for any considerable time remained stationary; and, in some of the States, scarcely a session of the legislature passes without changes.

§ 953. **This Subject** — is of the greatest practical importance to the lawyer, and it is not in general so well understood as it ought to be. It requires special study; for many of its principles are peculiar, not extending into the other departments of the law. Its difficulties grow in the main out of an almost constant blending of law and equity, and out of the interpretations of new statutes.

§ 954. *The Doctrine of this Chapter restated.*

The leading doctrine of this chapter is, that the law has hitherto been unable to devise rules so regulating the contracts of married women as to do justice to all persons interested, and in no case leave any one to suffer. So obvious are the defects of the unwritten law that legislation has in recent times been very busy in attempts to amend it. Yet where it has remedied old evils it has created, perhaps in equal or greater numbers, new ones; and the ideal good seems far away. It would be useless to prophesy concerning the future.

CHAPTER XXXV.

INSANE PERSONS.¹

§ 955. **Compared with Infancy and Coverture.** — It is plain, from the last two chapters, that the incapacities of infancy and coverture differ; and, from this one compared with them, it will appear that the incapacity of insanity is so unlike either as to render analogies from it of little help.

§ 956. **The Principle.** — Since parties can enter into a contract only through the accord of their minds,² there can be none where the mind of either lacks the capacity to consent. This is the rule only of the actual contract, not extending to that created by the law; for, in the latter, consent is not an element.³ And, —

§ 957. **Other Principles combining.** — In the application of this principle it is necessarily brought into conflict with other principles; and then it often becomes a nice question, which one must give way, and how far, and whether the combination creates any and what doctrine not precisely like either. For, as insanity is not always perpetual or total, the insane person may have rights growing out of his partial or returning capacity, or an innocent person contracting with him may appeal to good faith and benefits conferred, or something may be due to the general convenience of life and business, or to what is practically equitable and just. To descend to particulars, —

§ 958. **Name and Source of Insanity.** — The name and source of the insanity are, as respects these discussions, im-

¹ Compare with 1 Bishop Crim. Law, § 374-396. And see ante, § 29, 200, 232, 233, 618, 656, 735.

² Ante, § 313.

³ Ante, § 185, 199, 200, 232, 233.

material. One who is an idiot,¹ lunatic,² or in any other form *non compos mentis*,³ — in all his faculties, or a monomaniac as to the particular thing,⁴ — of intellect in a sufficient degree weak,⁵ imbecile from age,⁶ or deranged, — is equally incapable of executing a perfectly valid contract. On the other hand, —

§ 959. **Lucid Interval — Temporary Insanity.** — A person habitually insane has the power of contract in a lucid interval.⁷ In like manner, one ordinarily sane is incapacitated if insane at the particular time.⁸

§ 960. **Own Fault — (Drunkenness).** — Insanity superinduced by the fault of the insane person, — as, by his habitual and long-continued drunkenness, — does not differ in legal effect from that by the direct visitation of God.⁹

§ 961. **Limited — (Capacity for Some Things, not Others).** — One may have the ability to dispose judiciously of his property to near friends by will, yet not to comprehend what is necessary for the command of an army. And, in the law, a person is not unfrequently deemed to have capacity to do

¹ *Millison v. Nicholson*, Conference, 499.

² *Merritt v. Gumaer*, 2 Cow. 552; *Carr v. Holliday*, 5 Ire. Eq. 167; *Ward v. Kelly*, 1 Ind. 101.

³ *Taylor v. Dudley*, 5 Dana, 308; *In re Livingston*, 34 N. Y. 555; *Van Deusen v. Sweet*, 51 N. Y. 378.

⁴ *Alston v. Boyd*, 6 Humph. 504; *Bond v. Bond*, 7 Allen, 1; *Boyce v. Smith*, 9 Grat. 704; *Riggs v. American Tract Soc.* 95 N. Y. 503.

⁵ *Sentance v. Poole*, 3 Car. & P. 1; *Johnson v. Chadwell*, 8 Humph. 145; *Beller v. Jones*, 22 Ark. 92; *McFaddin v. Vincent*, 21 Texas, 47; *Hale v. Brown*, 11 Ala. 87; *James v. Langdon*, 7 B. Monr. 193; *Wilson v. Oldham*, 12 B. Monr. 55; *Owings's Case*, 1 Bland, 370; *Dodds v. Wilson*, 1 Tread. 448; *Somes v. Skinner*, 16 Mass. 348; *Connant v. Jackson*, 16 Vt. 335.

⁶ *Coleman v. Frazer*, 3 Bush, 300; *Jeneson v. Jeneson*, 66 Ill. 259; *Keeble v. Cummins*, 5 Hayw. 43; *Parris v. Cobb*, 5 Rich. Eq. 450; *Hinchman v. Emans*,

Saxton, 100; *Farnam v. Brooks*, 9 Pick. 212, 220; *Green v. Wood*, 2 Vern. 632. Old age alone does not take away the power of contract, it is simply one of the causes of mental feebleness; and, in most of the cases, its infirmities are considered in connection with fraud, undue influence, and other like things. See the foregoing cases, also *Stone v. Wilbern*, 83 Ill. 105; *Griffiths v. Robins*, 3 Madd. 191; *Lewis v. Pead*, 1 Ves. Jr. 19; *Shaw v. Ball*, 55 Iowa, 55; *Crowe v. Peters*, 63 Misso. 429; *Wildrick v. Swain*, 7 Stew. Ch. 167.

⁷ *Tozer v. Saturlee*, 3 Grant, Pa. 162; *Jones v. Perkins*, 5 B. Monr. 222; *Hall v. Warren*, 9 Ves. 605; *Lilly v. Waggoner*, 27 Ill. 395; *Beckwith v. Butler*, 1 Wash. Va. 224.

⁸ *Curtis v. Brownell*, 42 Mich. 165; *Jenners v. Howard*, 6 Blackf. 240; *Peaslee v. Robbins*, 3 Met. 164.

⁹ *Bliss v. Connecticut, &c. Railroad*, 24 Vt. 424; *Menkins v. Lightner*, 18 Ill. 282.

one binding act, but not another.¹ Nor is the insanity of the civil department of our law identical with that of the criminal.² Nor, if a person is unable to make a contract, is the consequence inevitable that he should or may be physically restrained.³ And, as to contract only, it is evident that one may possess the faculties required for entering into a particular agreement, yet not into another, because of the differing natures of their subjects.⁴ The inquiry is always as to the particular thing. In general, —

§ 962. **Insanity as to Contract, defined.** — In the law of contracts, insanity is such disease, weakness, or other imperfection or derangement of the mind as disqualifies it, when entering into the form of a contract,⁵ to comprehend the subject of it, and its nature and probable consequences.⁶ Hence, —

§ 963. **Degree and Kind.** — There may be delusions on independent subjects,⁷ or even a general insanity,⁸ which will not impair a contract. The derangement must cover its special matter, and be in degree sufficient to satisfy the definition just given.⁹ Thus, one who is a monomaniac in religion,¹⁰ or “of exceeding weak and feeble intellect and incapable of taking care of himself,”¹¹ or vacillating and shiftless,¹² —

¹ 1 Bishop Mar. & Div. § 126–128; Howard v. Coke, 7 B. Monr. 655; Converse v. Converse, 21 Vt. 168; Kinne v. Kinne, 9 Conn. 102; Stubbs v. Houston, 33 Ala. 555; Hall v. Hall, 18 Ga. 40; Gaither v. Gaither, 20 Ga. 709.

² 1 Bishop Crim. Law, § 396.

³ Look v. Dean, 108 Mass. 116.

⁴ Bishop Mar. & Div. as above.

⁵ Lewis v. Baird, 3 McLean, 56; Beckwith v. Butler, 1 Wash. Va. 224; Jenners v. Howard, 6 Blackf. 240.

⁶ Lozear v. Shields, 8 C. E. Green, 509; 1 Chit. Con. 11th Am. ed. 185; Bond v. Bond, 7 Allen, 1, 8; Brown v. Brown, 108 Mass. 386; Henderson v. McGregor, 30 Wis. 78; Musselman v. Cravens, 47 Ind. 1; Blakeley v. Blakeley, 6 Stew. Ch. 502; Edwards v. Daventry, 20 Fed. Rep. 756, 758, 759, 4 McCrary, 34; Hill v. Day, 7 Stew. Ch. 150.

⁷ Lozear v. Shields, 8 C. E. Green, 509.

⁸ Searle v. Galbraith, 73 Ill. 269.

⁹ Hovey v. Hobson, 55 Maine, 256; Miller v. Craig, 36 Ill. 109; Speers v. Sewell, 4 Bush, 239; Hovey v. Chase, 52 Maine, 304; Dennett v. Dennett, 44 N. H. 531; Odell v. Buck, 21 Wend. 142; Osterhout v. Shoemaker, 3 Hill, N. Y. 513; Rippey v. Gant, 4 Ire. Eq. 443; Samuel v. Marshall, 3 Leigh, 567; Smith v. Elliott, 1 Pat. & H. 307; Farnam v. Brooks, 9 Pick. 212; Somes v. Skinner, 16 Mass. 348, 358; Siemon v. Wilson, 3 Edw. Ch. 36; Smith v. Beatty, 2 Ire. Eq. 456.

¹⁰ Burgess v. Pollock, 53 Iowa, 273; Boyce v. Smith, 9 Grat. 704; West v. Russell, 48 Mich. 74.

¹¹ Lawrence v. Willis, 75 N. C. 471.

¹² West v. Russell, supra.

or, *a fortiori*, simply deaf and dumb,¹— may still have the power of making a particular agreement; and, on the other hand, one of general capacity will be held incapable if he labored under a delusion, as to the individual matter, intralling his judgment and will.² Hence, —

§ 964. **The Insanity prompting, or not.** — Laying aside the theories of medical experts, practical observation, which is the guide in the law, discloses that there are persons neither completely insane nor completely sane. Many or most of their acts appear to be both rational in themselves and to proceed from the normal faculties, while, in others, the mind is more or less clouded. Where the mental disorder is not far advanced or of a positive character, the law, in determining whether or not to give effect to a particular act of contracting, looks into the nature of the agreement, and into the influences leading thereto. Is it fair and just? Was the consideration adequate? Did the other party know of the mental derangement? Did he seek an advantage in consequence of such knowledge? Was undue influence used — is there any taint of fraud? Did the supposed insane person have any friendly advice, and what was its nature, and from whom? Enlightened by the answers to questions like these, as well as those which bear more directly on the mental condition, the court or jury are to declare whether the contract was the offspring of insanity, or of the competent, normal mind. If the former, it is ill; if the latter, it is good.³

¹ *Barnett v. Barnett*, 1 Jones, Eq. 221; *Brown v. Brown*, 3 Conn. 299; *Brower v. Fisher*, 4 Johns. Ch. 441; *Christmas v. Mitchell*, 5 Ire. Eq. 535.

² *Riggs v. American Tract Soc.* 95 N. Y. 503.

³ See and compare ante, § 656–658, 719, 731–744; *Wray v. Wray*, 32 Ind. 126; *Jeneson v. Jeneson*, 66 Ill. 259; *Behrens v. McKenzie*, 23 Iowa, 333; *Waters v. Barral*, 2 Bush, 598; *Owings's Case*, 1 Bland, 370; *Jones v. Perkins*, 5 B. Monr. 222; *Holland v. Miller*, 12 La. An. 624; *Dodds v. Wil-*

son, 1 Tread. 448, 3 Brev. 389; *Hinchman v. Emans*, Saxton, 100; *Neely v. Anderson*, 2 Strob. Eq. 262; *Conant v. Jackson*, 16 Vt. 335; *Keeble v. Cummins*, 5 Hayw. 43; *Parris v. Cobb*, 5 Rich. Eq. 450; *McFaddin v. Vincent*, 21 Texas, 47; *Hale v. Brown*, 11 Ala. 87; *James v. Langdon*, 7 B. Monr. 193; *Wilson v. Oldham*, 12 B. Monr. 55; *Johnson v. Johnson*, 10 Ind. 387; *Niell v. Morley*, 9 Ves. 478; *Evans v. Blood*, 3 Bro. P. C. 632; *Sergeson v. Sealy*, 2 Atk. 412; s. c. nom. *Sergison v. Sealey*, 9 Mod. 370; *Clerk v. Clerk*, 2 Vern.

§ 965. **Effect.** — There are some differences of judicial opinion, and in the circumstances of the particular case there may be room for doubt, as to the precise effect of insanity admitted or proved. In a general way, the propositions may be stated as follows.

§ 966. **Executory.** — It is believed that, at least by the better doctrine, while still there may be doubts on some of the authorities, no mere executory undertaking which proceeded from an insane mind, not including herein the creations of the law, is binding on the insane person.¹ The qualifications of this doctrine, if such there are, will appear as we proceed. As to the contracts which are —

§ 967. **Created by Law.** — We have seen that insanity is no impediment to the law in creating a contract.² Hence —

§ 968. **Necessaries — Preservation of Estate.** — An insane person is liable for necessaries, like an infant, or a husband in respect of his wife, yet under limitations not quite the same as in those cases.³ And, whatever be the rule as to infants,⁴ this liability extends to what is needful for the preservation of his estate.⁵ It extends also to necessaries furnished the lunatic's wife.⁶ But if, in fact, the credit was

412, 414; *Stockley v. Stockley*, 1 Ves. & B. 23; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Curtis v. Brownell*, 42 Mich. 165; *Graham v. Castor*, 55 Ind. 559; *Stone v. Wilbern*, 83 Ill. 105.

¹ 1 Chit. Con. 11th Am. ed. 191; *Musselman v. Cravens*, 47 Ind. 1; *Rice v. Peet*, 15 Johns. 503; *Fitzgerald v. Reed*, 9 Sm. & M. 94; *Crowther v. Rowlandson*, 27 Cal. 376; *Maddox v. Simmons*, 31 Ga. 512; *Burke v. Allen*, 9 Fost. N. H. 106; *McClain v. Davis*, 77 Ind. 419. See *Shoulders v. Allen*, 51 Mich. 529.

² Ante, § 956.

³ Ante, § 232-235; *Darby v. Cabanne*, 1 Misso. Ap. 126; *Stedman v. Hart*, 1 Kay, 607, 18 Jur. 744; *Baxter v. Portsmouth*, 5 B. & C. 170, 2 Car. & P. 178. Still, as late as 1882, the English court treated this question as being, in a case where the party supplying the

necessaries knew of the lunacy, "a very difficult point of law," to copy the words of Brett, L. J. "which I do not think has ever been settled by authority." In *re Weaver*, 21 Ch. D. 615, 620. It seems extraordinary that any legal person should hesitate on this question. If I see a man starving, and craving food of me, am I to supply him should I believe him to be sane, yet stand by and see him die of hunger when I know that God has deprived him of reason? One could not easily state a case more completely than this supposed one within the principle on which the law creates a contract.

⁴ Ante, § 911.

⁵ *Williams v. Wentworth*, 5 Beav. 325. See *Surles v. Pipkin*, 69 N. C. 513.

⁶ *Read v. Legard*, 6 Exch. 636, 15 Jur. 494; *Davidson v. Wood*, 1 De G., J. & S. 465, 9 Jur. n. s. 589.

given to a third person, and not to the lunatic, the law creates no promise from the latter, and he is not responsible.¹ Beyond this, —

§ 969. **Other Benefits conferred.** — (**Executed.**) — Within limits a little uncertain, if, where a contract has been executed, it has resulted in a benefit to the insane person, the law will create a promise from him to pay what the benefit is reasonably worth, — a rule not extending to like cases without benefit.² At all events, this doctrine is reasonably clear as applied to cases where the party thus conferring the benefit was —

§ 970. **Ignorant of the Insanity.** — The authorities on this question are in a degree conflicting or indistinct; but, by most and probably all opinions, it is sometimes a material circumstance that the sane person did not know of the other's insanity.³ In England, the doctrine seems to be general, that, whenever the party contracting with the insane person proceeded honestly and fairly, and without either actual knowledge of his insanity or anything to excite suspicion of it, and the contract is equitable and just, and is on one or both sides executed, it will be binding on the insane person unless the parties, on its rescission, can be placed *in statu quo*.⁴ And nearly or exactly the same thing is held in a part of our States.⁵ For example, the lunatic has been compelled

¹ Massachusetts Gen. Hosp. v. Fairbanks, 129 Mass. 78, 81, 132 Mass. 414.

² Ante, § 233; Lincoln v. Buckmaster, 32 Vt. 652; Carr v. Holliday, 5 Ire. Eq. 167; Kendall v. May, 10 Allen, 59; Searle v. Galbraith, 73 Ill. 269.

³ Behrens v. McKenzie, 23 Iowa, 333; Succession of Smith, 12 La. An. 24; Carr v. Holliday, 1 Dev. & Bat. Eq. 344; Molton v. Camroux, 2 Exch. 487, 4 Exch. 17; Beavan v. McDonnell, 9 Exch. 309; Baxter v. Portsmouth, 5 B. & C. 170; Fay v. Burditt, 81 Ind. 433; Crawford v. Scovell, 13 Norris, Pa. 48; Moore v. Hershey, 9 Norris, Pa. 196; Shoulters v. Allen, 51 Mich. 529; Fecl v. Guinault, 32 La. An. 91.

⁴ Molton v. Camroux, supra; Beavan

v. McDonnell, supra, and 10 Exch. 184; Dane v. Kirkwall, 8 Car. & P. 679; Campbell v. Hooper, 3 Smale & G. 153, 1 Jur. n. s. 670; Moss v. Tribe, 3 Fost. & F. 297. See also Drew v. Nunn, 4 Q. B. D. 661. In the equity case of Elliot v. Ince, 7 De G. M. & G. 475, 3 Jur. n. s. 597, 600, "the result of the authorities" was deemed to be "that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding."

⁵ Wilder v. Weakley, 34 Ind. 181; Northwestern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535, 544; Riggan

to repay money lent under these circumstances.¹ Especially in equity has this doctrine been enforced; resting, it is said, on the maxim that he who seeks equity must do equity.² Consequently the equity tribunal will not set aside, on the ground of insanity, a conveyance of lands made for value to a purchaser in good faith, who was ignorant of the grantor's mental condition.³ On the other hand, it is by many of our courts held, at least at law, that, since insanity incapacitates one to make a contract, the mere fact of the other party's not knowing it does not render good what he was legally incompetent to do.⁴ It is difficult to resist the force of this proposition, especially as it harmonizes with what is held in respect of the contracts of infants. And under the title Infancy, the reader will see how the doctrine ought to be carried out. At the same time, and as a qualification of what would thus appear to be the better rule, it may well be held, in accordance with what has already been laid down,⁵ that where, in these circumstances, the parties cannot on rescission be placed *in statu quo*, the law creates a promise from the insane person to remunerate the other for whatever benefit was actually conferred and enjoyed. Practically, in the larger number of cases, the following of this better doctrine amounts simply to the adoption of a better form of reasoning; for, with exceptions believed not to be numerous, the end reached by the two methods will be the same.

§ 971. **Allege own Insanity — Rescission.** — Contrary to what was formerly held by the courts, the modern law permits a party to set up his own insanity in avoidance of his contract.⁶

v. Green, 80 N. C. 236; *Crawford v. Scovell*, 13 Norris, Pa. 48; *Copenrath v. Kienby*, 83 Ind. 18, 24; *Wirebach v. Easton Bank*, 1 Out. Pa. 543.

¹ *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541.

² *Mutual Life Ins. Co. v. Hunt*, supra, at p. 546.

³ *Ashcraft v. De Armond*, 44 Iowa, 229; *Riggan v. Green*, supra; *Niell v. Morley*, 9 Ves. 478. See *Bevin v. Powell*, 11 Misso. Ap. 216.

⁴ *Scaver v. Phelps*, 11 Pick. 304;

Hovey v. Hobson, 53 Maine, 451, 453; *Rogers v. Blackwell*, 49 Mich. 192; *Edwards v. Davenport*, 20 Fed. Rep. 756, 4 McCrary, 34. Compare with *Shoulders v. Allen*, supra.

⁵ Ante, § 233, 969.

⁶ *Seaver v. Phelps*, 11 Pick. 304; *Rice v. Peet*, 15 Johns. 503; *Ballew v. Clark*, 2 Ire. 23; *Bensell v. Chancellor*, 5 Whart. 371; *Morris v. Clay*, 8 Jones, N. C. 216; *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; *Grant v. Thompson*, 4 Conn. 203;

Nor, in avoiding it, need he always, even where it is executed, return the consideration.¹

§ 972. **Voidable or Void.**—The doctrine of some of the cases appears to be, that contracts impeachable for insanity are absolutely void. And there may be those in which it should be so held.² Yet, as in infancy,³ there can be but little just ground for the void. Thus, —

§ 973. **Sane Party.**—Plainly, in justice, the sane party ought ordinarily to be holden, whether he knew of the insanity or not, if the other or his representative so elects. The authorities on this point may be conflicting, but such is believed to be the better doctrine.⁴ This alone would make the contract voidable, whatever the courts should hold its other consequences to be.⁵ Again, —

§ 974. **Ratification or Disaffirmance.**—In general, this contract, like an infant's,⁶ may be ratified or disaffirmed by the insane party's guardian⁷ or committee,⁸ or by himself during a lucid interval, or on becoming sane;⁹ or, after his death, by his proper legal representative.¹⁰ This alone, also, would place it among the voidable, even though in other respects it should be treated as void.¹¹ Hence, —

§ 975. **Voidable — (Transmits Ownership — Seisin).**—In most cases, the contract is held to be merely voidable by the insane person or his legal representatives; and, while not so avoided, binding on the other party. Admitting of ratifica-

Lang v. Whidden, 2 N. H. 435; Thornton v. Appleton, 29 Maine, 298; Tolson v. Garner, 15 Misso. 494; Turner v. Rusk, 53 Md. 65.

¹ Gibson v. Soper, 6 Gray, 279; Foss v. Hildreth, 10 Allen, 76, 80; Halley v. Troester, 72 Misso. 73.

² Van Deusen v. Sweet, 51 N. Y. 378; Marvin v. Lewis, 61 Barb. 49; Allen v. Allen, 9 Fost. N. H. 106; Edwards v. Davenport, 20 Fed. Rep. 756, 4 McCary, 34. And see Evans v. Horan, 52 Md. 602; Rogers v. Blackwell, 49 Mich. 192; Niell v. Morley, 9 Ves. 478.

³ Ante, § 929.

⁴ Allen v. Berryhill, 27 Iowa, 534.

⁵ Ante, § 611, 617, 618.

⁶ Ante, § 936-944.

⁷ McClain v. Davis, 77 Ind. 419; Halley v. Troester, 72 Misso. 73.

⁸ Moore v. Hershey, 9 Norris, Pa. 196.

⁹ Arnold v. Richmond Iron Works, 1 Gray, 434; Allis v. Billings, 6 Met. 415; Gibson v. Soper, 6 Gray, 279; Elston v. Jasper, 45 Texas, 409; Northwestern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535; Turner v. Rusk, 53 Md. 65.

¹⁰ Schuff v. Ransom, 79 Ind. 458; Campbell v. Kuhn, 45 Mich. 513.

¹¹ Ante, § 620.

tion, if, for example, it is a deed of lands or conveyance of personalty in the executed form,¹ it will, without such affirmation, transmit the seisin or ownership to the other party.² Still, —

§ 976. **Innocent Third Person.** — We have seen³ that, where a contract, voidable for fraud in the inducement to it, is executed by a conveyance to the defrauding party, if this party for a consideration adequate and valuable conveys the thing to a third person ignorant of the fraud, the title is thereby perfected in the latter, and he cannot be divested of it. Which result is a deduction from the equitable rule, that he who suffers his own weakness to be imposed upon, and is consequently in a measure to blame, must bear a loss rather than the meritorious third person who is free of fault.⁴ In a case of insanity, the considerations are reversed. To the insane, not even carelessness can be attributed. And the third person was in a degree careless; because, insanity being usually a permanent condition, he could ascertain it by inquiry, as a third person could not a fraud. Therefore the consequence ought to be, that, if real estate, for example, has by the deed of an insane man passed to one who has conveyed it to a third person, though for its full value, and without notice, this third person has a mere defeasible seisin, like his grantor. And so, in such few cases as we have to the point, it is held.⁵

§ 977. **Commission of Lunacy — Guardianship.** — In Eng-

¹ Ante, § 942.

² *Matthews v. Baxter*, Law Rep. 8 Ex. 132; *Allis v. Billings*, 6 Met. 415; *Merritt v. Gumaer*, 2 Cow. 552; *Crouse v. Holman*, 19 Ind. 30; *Breckenridge v. Ormsby*, 1 J. J. Mar. 236; *Somers v. Pumphrey*, 24 Ind. 231; *Cates v. Woodson*, 2 Dana, 452; *Hovey v. Hobson*, 53 Maine, 451; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Ingraham v. Baldwin*, 5 Selden, 45; *Fay v. Burditt*, 81 Ind. 433; *Freed v. Brown*, 55 Ind. 310; *Elston v. Jasper*, 45 Texas, 409; *Nichol v. Thomas*, 53 Ind. 42; *Mohr v. Tulip*, 40 Wis. 66; *Evans v. Horan*, 52 Md. 602; *Copenrath v. Kienby*, 83 Ind. 18;

Blakeley v. Blakeley, 6 Stew. Ch. 502; *Gibson v. Soper*, 6 Gray, 279; *Wait v. Maxwell*, 5 Pick. 217.

³ Ante, § 673, 674.

⁴ See *Rawls v. Deshler*, 4 Abb. Ap. Dec. 12.

⁵ *Hovey v. Hobson*, 53 Maine, 451; *Somers v. Pumphrey*, 24 Ind. 231, 238; *Long v. Fox*, 100 Ill. 43; *Rogers v. Blackwell*, 49 Mich. 192, 194. See *Cates v. Woodson*, 2 Dana, 452; *Fuentes v. Montis*, Law Rep. 3 C. P. 268, 276, 277; *Cole v. Northwestern Bank*, Law Rep. 10 C. P. 354, 362, 363; *Alcock v. Alcock*, 3 Man. & G. 268.

land and in our States, there are statutes by which the insane person may be put under the care of a commission of lunacy, or of a committee, or guardian. Generally, with us, it is a guardian. The provisions differ so much that it would be unwise to set them out, with their expositions, in this chapter. The practitioner's reliance will be chiefly on the statutes and decisions of his own State. There are a few questions in a measure common to England and most of our States, depending on a mingling of statutory provisions and common-law interpretations, on not all of which are the adjudications absolutely harmonious. According to these, largely the contract of an insane person under guardianship is void, not voidable;¹ by some, the guardianship precludes the power of contract;² by the greater number, it is believed, the power of contract remains, yet the guardianship creates a strong *prima facie* presumption of incapacity, not conclusive;³ and, on general principles, with little room for doubt, it operates so far retrospectively that it is admissible also as an inconclusive presumption of insanity at a previous date,⁴ — not, however, varying the legal effect of the prior act of contracting.⁵

§ 978. *The Doctrine of this Chapter restated.*

An insane person, like an infant, is incapable of binding himself by a contract; though, where necessity requires, the law will bind him. But there is commonly no just ground for exempting a sane person, who enters into a bargain with him, from its obligations. Therefore the insane party ought to have the benefit of it, should it be advantageous to him.

¹ *Elston v. Jasper*, 45 Texas, 409; *Nichol v. Thomas*, 53 Ind. 42; *Mohr v. Tulip*, 40 Wis. 66; *Freed v. Brown*, 55 Ind. 310; *Griswold v. Butler*, 3 Conn. 227; *Wait v. Maxwell*, 5 Pick. 217; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sherman*, 14 Barb. 169.

² *Wadsworth v. Sharpsteen*, 4 Selden, 388; *Imhoff v. Witmer*, 7 Casey, Pa. 243.

³ *Hart v. Deamer*, 6 Wend. 497;

Hopson v. Boyd, 6 B. Monr. 296; *Snook v. Watts*, 11 Beav. 105, 12 Jur. 444; *Jacobs v. Richards*, 18 Beav. 300, 18 Jur. 527; *Little v. Little*, 13 Gray, 264; *Yauger v. Skinner*, 1 McCart. 389; *Hunt v. Hunt*, 2 Beasley, 161; *Parker v. Davis*, 8 Jones, N. C. 460.

⁴ 2 Bishop Mar. & Div. § 566, 567; *Faulder v. Silk*, 3 Camp. 126.

⁵ *Niell v. Morley*, 9 Ves. 478.

So the law adjudges. Consequently it terms the contract in such circumstances voidable, — the insane may avoid it; but, if he does not, it binds the sane. Yet, when it is avoided, the avoidance, like an infant's of his contract,¹ works more strongly against an innocent third person than does the avoidance of a fraudulent contract by the party defrauded. The nature and degree of the insanity are material simply to the extent that, to invalidate the contract, they must so far impair the understanding or will as to preclude the free and intelligent consent to the thing in terms agreed.

¹ Ante, § 928.

CHAPTER XXXVI.

DRUNKEN PERSONS.

§ 979. **Branch of Insanity.** — The incapacity which comes from being drunk is, in civil jurisprudence, identical in principle with that of temporary insanity. Consequently the doctrines of the last chapter should, to the extent applicable, be regarded by the reader as incorporated into this.

§ 980. **Incapacity of Contract.** — By the modern law, contrary to what was held in former times, intoxication, so deep as to take away the agreeing mind, — in other words, to disqualify the mind to comprehend the subject of the contract and its nature and probable consequences,¹ — impairs such contract if made while it lasts, the same as insanity.² But, —

§ 981. **Degree.** — Mere drunkenness, or being a drunkard, or simply being drunk at the time, where the intoxication does not extend to the degree thus stated, will not impair the contract.³ To have this effect, it must render the party *non compos mentis* for the occasion.⁴

¹ Ante, § 962.

² 1 Bishop Mar. & Div. § 131; 2 Kent Com. 451, 452; Pitt v. Smith, 3 Camp. 33; Fenton v. Holloway, 1 Stark. 126; Dulany v. Green, 4 Harring. Del. 285; Drummond v. Hopper, 4 Harring. Del. 327; Cummings v. Henry, 10 Ind. 109; Berkley v. Cannon, 4 Rich. 136; Johns v. Fritchey, 39 Md. 258; Williams v. Inabnet, 1 Bailey, 343; Wilson v. Bigger, 7 Watts & S. 111; Gore v. Gibson, 13 M. & W. 623, 9 Jur. 140; Hawkins v. Bone, 4 Fost. & F. 311; Shaw v. Thackray, 1 Smale & G. 537, 17 Jur. 1045.

³ Pickett v. Sutter, 5 Cal. 412;

Woods v. Pindall, Wright, Ohio, 507; Belcher v. Belcher, 10 Yerg. 121; Morris v. Nixon, 7 Humph. 579; Lightfoot v. Heron, 3 Y. & Col. Ex. 586; Hutchinson v. Brown, Clarke, N. Y. 408; Henry v. Ritenour, 31 Ind. 136; Reinicker v. Smith, 2 Har. & J. 421; Caulkins v. Fry, 35 Conn. 170, 172; Cavender v. Waddingham, 5 Misso. Ap. 457; Reynolds v. Dechaums, 24 Texas, 174.

⁴ Bates v. Ball, 72 Ill. 108; Van Wyck v. Brasher, 81 N. Y. 260; Cooke v. Clayworth, 18 Ves. 12; Schramm v. O'Connor, 98 Ill. 539.

§ 982. **Habitual.** — The contract of an habitual drunkard is good if made in a sober interval.¹

§ 983. **Making Drunk.** — Drunkenness, thus to disqualify, need not have been brought about by the artifice of the other party.² But, where it is, less will suffice; for then fraud mingles with it.³ So —

§ 984. **Undue Advantage** — taken of a drunken man may impair a contract which, if he were sober, would be good.⁴

§ 985. **Voidable — Ratify.** — The contract is not void, but voidable, and it may be ratified by the party when sober.⁵

§ 986. **How ratify.** — One method of ratification is to keep the consideration received.⁶

§ 987. *The Doctrine of this Chapter restated.*

Drunkenness, carried to a sufficient degree, operates in civil jurisprudence as a sort of insanity. In the criminal law, it is regarded in the nature of a crime; so that, if a man wilfully makes himself drunk, then commits a wrongful act of the class which is indictable when done from general malevolence, not requiring a specific criminal intent, he is punishable the same as though he were sober.⁷ But this doctrine has no application in the law of contracts. Or, exactly, a contract requires a specific intent, — a mental determination to enter into the particular agreement which its words express. Consequently the intoxicated party would not be bound even under the rules of the criminal law.⁸

¹ Ritter's Appeal, 9 Smith, Pa. 9.

² Donelson v. Posey, 13 Ala. 752; Freeman v. Staats, 4 Halst. Ch. 814; French v. French, 8 Ohio, 214; Wigglesworth v. Steers, 1 Hen. & M. 70. Nor need it have been known by him. Hawkins v. Bone, 4 Fost. & F. 311.

³ Ante, § 656, 734; Say v. Barwick, 1 Ves. & B. 195; Willcox v. Jackson, 51 Iowa, 208.

⁴ Ante, § 656, 734; Henry v. Ritenour, 31 Ind. 136; Burroughs v. Richman, 1 Green, N. J. 233; Birdsong v.

Birdsong, 2 Head, 289; Mansfield v. Watson, 2 Iowa, 111; White v. Cox, 3 Hayw. 79; Cooke v. Clayworth, 18 Ves. 12; Murray v. Carlin, 67 Ill. 286; Butler v. Mulvihill, 1 Bligh, 137.

⁵ Matthews v. Baxter, Law Rep. 8 Ex. 132. See Caulkins v. Fry, 35 Conn. 170; ante, § 972-976.

⁶ Williams v. Inabnet, 1 Bailey, 343; Joest v. Williams, 42 Ind. 565. But see Reinskopf v. Rogge, 37 Ind. 207.

⁷ 1 Bishop Crim. Law, § 397-416.

⁸ Ib. § 408-415.

CHAPTER XXXVII.

THE GOVERNMENT AND ITS OFFICERS.

§ 988. **Sovereign's Power of Contract.** — Sovereignty, in every government, including the governments of the United States and of the several States within their respective jurisdictions, carries with it the power of contract. In constitutional governments, therefore especially in ours, it can be exercised only within the limits and in the methods defined by the constitution and laws.¹ For example, the government of the United States can, through its proper officers, enter into a contract with an individual to put in execution what the law empowers it to do, without an expressly authorizing statute, as “an incident to the general right of sovereignty.”² And its capacity of contract is coextensive with its functions.³ But an act of contracting by an officer or in a manner not legally authorized,⁴ or, *a fortiori*, one not within the sphere of the government, is ineffectual. These government contracts have some peculiarities; such as, —

§ 989. **Suit on the Contract.** — From the earliest times to the present in England, the common law has forbidden the subject to sue the sovereign in a judicial tribunal, it being deemed an affront to the royal dignity;⁵ he might simply

¹ Ante, § 555; 1 Bl. Com. 234, 243, 257, 336; 2 Ib. 346, 347; Danolds v. The State, 89 N. Y. 36, 44; United States v. Tingey, 5 Pet. 114, 128; Canal v. Railroad, 4 Gill & J. 1.

² United States v. Tingey, *supra*.

³ United States v. Maurice, 2 Brock. 96; United States v. Lane, 3 McLean, 365.

⁴ The Floyd Acceptances, 7 Wal. 666; Peirce v. United States, 1 Ct. of Cl. 270; Martin v. United States, 4 T. B. Monr. 487; In re Right of Employees, 2 Lawrence Compt. Dec. 501, 507, 509; In re Authority to make Contract, 3 Lawrence Compt. Dec. 92.

⁵ Willion v. Berkley, 1 Plow. 223, 241.

seek redress, in the sovereign's court, by what is termed a petition of right.¹ Where the crown was plaintiff, the defending subject was permitted, after judgment rendered against him, to have his writ of error, — a question upon which there were early doubts.² This doctrine has become common law with us; to the extent that, in the absence of permission, no action will lie against either the United States³ or one of our States.⁴ Still either may consent to be sued,⁵ and so may a foreign government.⁶ Besides the waiver of the objection in the particular case, the consent may be given by a general statutory or constitutional provision; and the United States has given it in part by establishing the Court of Claims, and some of the States have yielded it more fully.⁷ On the other hand, the government has the same power of bringing and maintaining suits as an individual.⁸ So likewise, while it is protected from being sued, the law holds its contracts obligatory upon it in every respect, the same as those of individuals are upon them.⁹

§ 990. *Interpretation.* — In general, government contracts are interpreted by the same rules as those of individuals. But in early times there were a few differences, not all of which have become obliterated. As already seen, a difference which remains is, that the government contract is construed more strongly against the private party;¹⁰ the rule of the old law being, that, "if the right lie equal between the

¹ *Walsingham's Case*, 2 Plow. 547, 553; *Thomas v. Reg.* Law Rep. 10 Q. B. 31.

² *Hurlston's Case*, 2 Leon. 194; *Anonymous*, Holt, 272, 1 Salk. 264; 1 Bishop Crim. Law, § 1024.

³ *United States v. Clarke*, 8 Pet. 436, 444.

⁴ *Ex parte Madrazzo*, 7 Pet. 627; *Michigan State Bank v. Hastings*, 1 Doug. Mich. 225, Walk. Mich. 9; *Michigan State Bank v. Hammond*, 1 Doug. Mich. 527; *People v. Talmage*, 6 Cal. 256; *Treasurers v. Cleary*, 3 Rich. 372; *Pattison v. Shaw*, 6 Ind. 377; *Williamsport, &c. Railroad v. Commonwealth*, 9 Casey, Pa. 288; *Troy*

and *Greenfield Railroad v. Commonwealth*, 127 Mass. 43.

⁵ *Cohens v. Virginia*, 6 Wheat. 264; *Sinking Fund Commissioners v. Northern Bank*, 1 Met. Ky. 174; *Garr v. Bright*, 1 Barb. Ch. 157.

⁶ *Manning v. Nicaragua*, 14 How. Pr. 517.

⁷ *The State v. Curran*, 7 Eng. 321; *Bishop Written Laws*, § 103, 178 a.

⁸ *The State v. Grant*, 10 Minn. 39; *Spencer v. Brockway*, 1 Ohio, 259; *United States v. Barker*, 1 Paine, 156.

⁹ *Ante*, § 563; *Danolds v. The State*, 89 N. Y. 36. And see the reasoning in *Metz v. Soule*, 40 Iowa, 236.

¹⁰ *Ante*, § 415.

king and subject, the king's title hath the preference."¹ So likewise "the king may grant a *chose in action*, but another cannot;"² out of which distinction, the question has arisen whether or not, at the common law, the government's assignment of its contract with an individual carries to the assignee the right to sue thereon at law in his own name.³ However this may be, —

§ 991. **Government preferred.** — The common law prefers the king to a private creditor in respect of debts due to both; so that, if the debtor cannot pay all, the crown has the first claim upon his property.⁴ This principle has been adopted by Congress in its legislation, and it is constantly acted upon by the courts of the United States.⁵ In probably most of our States, it is accepted as a part of their unwritten law;⁶ it is rejected in New Jersey.⁷

§ 992. **Form of Contracting.** — The government can contract only through its officers and other agents, duly authorized, and proceeding in the form prescribed by law.⁸ If, for example, a statute requires the particular sort of agreement to be in writing, an oral one will be without effect while unexecuted, though there may be rights growing out of its execution.⁹ Where, as in the ordinary case, the agent or officer derives his authority from the law,¹⁰ and so it is conclusively

¹ *Woodward v. Fox*, 2 Vent. 267, 268. "In the common law, the grant of every common person is taken most strongly against himself and most favorably towards the grantee; but the king's grant is taken most strongly against the grantee and most favorably for the king, although the thing which he grants came to the king by purchase or descent." *Willion v. Berkley*, 1 Plow. 223, 243.

² *Willion v. Berkley*, as above. One by reading on, at this place, will find many other distinctions; some of which, at least, are special to the old law. And see, in this connection, *Rex v. Hare*, 1 Stra. 266; *Anonymous*, 2 Salk. 603.

³ Post, § 1183.

⁴ *Harbert's Case*, 3 Co. 11 b, 12; *Rex v. Wells*, 16 East, 278, 281; *Stevenson's Case*, Cro. Car. 389; *Anonymous*, 3 Dy.

296 b, 297 a; *Brassey v. Dawson*, 2 Stra. 978, 981.

⁵ *United States v. State Bank*, 6 Pet. 29, 34; *United States v. Hack*, 8 Pet. 271; *Thelusson v. Smith*, 2 Wheat. 396; *Harrison v. Sterry*, 5 Cranch, 289; *United States v. King*, Wal. C. C. 13.

⁶ *The State v. Baltimore*, 10 Md. 504; *Green's Estate*, 4 Md. Ch. 349.

⁷ *Middlesex Freeholders v. New Brunswick State Bank*, 3 Stew. Ch. 311.

⁸ Ante, § 988; *Baltimore v. Reynolds*, 20 Md. 1; *People v. Talmage*, 6 Cal. 256; *Delafield v. Illinois*, 2 Hill, N. Y. 159; *The State v. Little Rock, &c. Railway*, 31 Ark. 701; *Osborne v. Tunis*, 1 Dutcher, 633.

⁹ *Clark v. United States*, 95 U. S. 539.

¹⁰ Ante, § 462.

presumed to be known to the private person contracting with him,¹ and the latter is cognizant of the fact² that the former is making the contract for the public and not for himself,³ some consequences follow distinguishing it from a mere individual bargaining.⁴ Thus, —

§ 993. **Estoppel of Government.** — The government is never estopped, as an individual or private corporation may be,⁵ on the ground that the agent is acting under an apparent authority which is not real; the conclusive presumption that his powers are known⁶ rendering such a consequence impossible. So that the government is bound only when there is an actual authorization.⁷ And this principle may extend to the agent of a municipal corporation and his contract,⁸ but it does not necessarily;⁹ as to which, the distinctions in the differing cases will be obvious. Again, —

§ 994. **Binding Government or Agent — (Municipal Corporation).** — Though the agent's powers are known, it is possible for him to employ a form of words and of contracting which will bind him, and not the government his principal, as the party.¹⁰ For example, if, in localities where a sealed instrument is construed as limiting the parties to those who are named as such therein,¹¹ the agent, whether his principal is the government or a municipal corporation, in terms, by a writing under seal, himself covenants, instead of expressing that his principal does, he, and not the other, will be holden.¹² Yet, even as to this, we have intimations that a contract by covenant, ostensibly and really on behalf of the government, is

¹ *The State v. Hastings*, 10 Wis. 518.

² *Ante*, § 463-465.

³ *Swift v. Hopkins*, 13 Johns. 313.

⁴ Compare with *ante*, § 293, 294.

⁵ *Sheldon Hat Blocking Co. v. Eickemeyer Hat, &c. Co.* 90 N. Y. 607, 64 How. Pr. 467; *McNeilly v. Continental, &c. Ins. Co.* 66 N. Y. 23; *Claffin v. Lenheim*, 66 N. Y. 301.

⁶ And see *ante*, § 293.

⁷ *The State v. Bevers*, 86 N. C. 588; *The State v. Hastings*, 10 Wis. 518; *Baltimore v. Eschbach*, 18 Md. 276; *Woodward v. Campbell*, 39 Ark. 580;

Baltimore v. Reynolds, 20 Md. 1. And see *ante*, § 268 310.

⁸ *Pine v. Huber Manuf. Co.* 83 Ind. 121.

⁹ *Cook v. Harms*, 108 Ill. 151.

¹⁰ *McCleinticks v. Bryant*, 1 Misso. 598; *Sheffield v. Watson*, 3 Caines, 69; *Lapsley v. McKinstry*, 38 Misso. 245; *Brown v. Rundlett*, 15 N. H. 360.

¹¹ *Ante*, § 426, 885.

¹² *Appleton v. Binks*, 5 East, 148; *Fullam v. West Brookfield*, 9 Allen, 1; *Cunningham v. Collier*, 4 Doug. 233.

excepted from the general rule ; and it, and not the agent, is in law the contracting party.¹ And, in other circumstances, including all bargainings by parol, whether written or oral, a contract made for the government, by its officer or other agent, though in his own name, binds his principal, but not himself personally.² This doctrine extends as well to a contract with a municipal corporation as to one with a State or the United States. It has been expressed by a learned judge to be, that "an agent, contracting on behalf of the public, is not personally bound by such contract, even though he would be by the terms of the contract if it were an agency of a private nature. It is not to be presumed, in such a case, that the party, dealing with such public officer, means to rely upon his individual responsibility."³

¹ *Unwin v. Wolseley*, 1 T. R. 674, 678 ; *Allen v. Waldegrave*, 8 Taunt. 566 ; *Stinchfield v. Little*, 1 Greenl. 231, 234 ; *Hodgson v. Dexter*, 1 Cranch, 345. Story lays down this doctrine without qualification ; namely, that the "principle" which makes the contract the government's, "not only applies to simple contracts, both parol and written, but also to instruments under seal, which are executed by agents of the government in their own names, and purporting to be made by them on behalf of the government ; for the like presumption prevails in such cases, that the parties contract, not personally, but merely officially, within the sphere of their appropriate duties." Story Agency, § 303. He refers for this to some text-books, to some of the cases which I have referred to in this note, and to *Macbeath v. Haldimand*, *infra* ; *Osborne v. Kerr*, 12 Wend. 179 ; *Walker v. Swartwout*, 12 Johns. 444 ; and *Bowen v. Morris*, 2 Taunt. 374. *Principles Conflicting*. — The question under consideration is one of the common sort, where two legal principles come into conflict with each other, and the one or the other must of necessity give way. The one principle

here is, that the agent's contract in his own name for the government shall be taken as the government's ; the other, that only those named as parties in specialties are such. Now, in the present conflict, which of these two principles ought to stand while the other is made to yield ? Were the question new, its decision on neither side would specially shock the legal conscience. But if I were to decide it, I should give the preference to Story's view. And the reason is, that the doctrine regarding specialties is merely technical, with no foundation in anything except former adjudications ; moreover, in modern times, the courts lean toward reducing them to the same rules which govern simple contracts in writing. On the other hand, there are solid sense and substantial justice in the rule which makes the agent's contract for the government the government's. Beyond this, if the reader will compare Story's opinion with that of Metcalf, J. in *Fullam v. West Brookfield*, *supra*, he will see that, on other grounds, this doctrine necessarily prevails in a part of our States.

² *Macbeath v. Haldimand*, 1 T. R. 172 ; *Hodgson v. Dexter*, 1 Cranch, 345 ;

³ *Bicknell, C. C., in Pine v. Huber Manuf. Co.* 83 Ind. 121.

§ 995. **Ratification.** — The government or municipal corporation, like a private principal, may ratify its agent's unauthorized act of contracting, thus rendering it good. It must be done by the proper power, with the formalities required by the particular case, — matters needing no special explanation.¹

§ 996. *The Doctrine of this Chapter restated.*

The government, whether of the United States or of a State, has within its sphere the same power of contract as an individual within his sphere. And, like an individual, it can enforce the contract in its courts. It is bound the same on its part, and the presumption is the same that it will perform; but, except with its consent, it cannot be sued. Since it can act only through its officers and other agents, its contracts must be ostensibly made by them. For which and other reasons, the presumption is always strong that it, and not the agent, is the party to a bargain in its interest. In the main, a government contract is interpreted by the same rules as a private one; but there are minor differences, already sufficiently explained.

Olney v. Wickes, 18 Johns. 122; Hull v. Marshall, 12 Iowa, 142; Cutler v. Ashland, 121 Mass. 588; Comer v. Bankhead, 70 Ala. 493; Allen v. Waldegrave, 8 Taunt. 566, 574; Fox v. Drake, 8 Cow. 191.

¹ Nashville v. Hagan, 9 Baxter, 495; People v. Brooks, 16 Cal. 11; The State v. Buttles, 3 Ohio State, 309; Delafield v. Illinois, 26 Wend. 192, 2 Hill, N. Y. 159.

CHAPTER XXXVIII.

FOREIGN GOVERNMENTS AND ALIENS.

§ 997. **In General.** — Our State and National governments, and all others dwelling under the law of nations, permit, as of comity, foreign sovereigns with whom they are at peace, and the subjects of such sovereigns, to make contracts within their territorial jurisdiction, and enforce both them and those entered into elsewhere in their tribunals. War intercepts these privileges for the time. We are now to consider them more minutely.

§ 998. **Sovereign.** — A foreign sovereign or State may, in his or its political capacity, sue in our courts ; and, with his or its consent, but not otherwise, may be sued therein ; the same rules being thus made applicable to the foreign government which, we saw in the last chapter, are applied to our own. The suit, with the exception of the foreign government's right to decline submitting itself to the jurisdiction when sued, is conducted by the same rules as are like suits, in the same court, between individuals.¹ The property of the foreign sovereign, though within our jurisdiction, cannot be attached or otherwise dealt with for the enforcement of the contract.² Our tribunals, in determining who is a foreign sovereign entitled to rights or immunities within these rules, follow the lead of the political department of the government ;

¹ *United States v. Wagner*, Law Rep. 94 ; *Munden v. Brunswick*, 10 Q. B. 656.
² *Ch. Ap.* 582 ; *Prioleau v. United States*, Law Rep. 2 Eq. 659 ; *Peru v. Weguelin*, Law Rep. 20 Eq. 140 ; *Brunswick v. Hanover*, 2 H. L. Cas. 1 ; *Spain v. Hullet*, 1 Cl. & F. 333 ; s. c. nom. *Hullet v. Spain*, 1 Dow & C. 169 ; *Columbia v. Rothschild*, 1 Sim.

² *Twycross v. Dreyfus*, 5 Ch. D. 605 ; *Wadsworth v. Spain*, 17 Q. B. 171 ; *De Haber v. Portugal*, 17 Q. B. 204 ; *Smith v. Weguelin*, Law Rep. 8 Eq. 198. See also *In re The Charkieh*, Law Rep. 8 Q. B. 197 ; 1 *Bishop Crim. Law*, § 125.

as, for example, if a colony rebels and sets up a government of its own, they do not acknowledge it until either the mother country or ours, in its political capacity, has done so.¹

§ 999. **Alien Subjects** — of governments with which we are at peace can ordinarily enter into contracts, with one another and with our own citizens, the same as if they were the subjects of our government. And they have the same protection and are under the same liabilities in our courts.² They may own personal property.³ At common law, they can take real estate by purchase or devise, not by descent, — in other words, by act of a party conveying or devising it, yet not by operation of law, — but cannot hold it against the sovereign or State.⁴ Therefore, so long as the State does not interfere, they can sue for the recovery of their realty.⁵ The disability has largely, with us, been removed by treaties and by statutes, — a matter into which it is not proposed here to enter.

§ 1000. **Alien Enemies.** — War changes this. It makes the subjects of the contending sovereigns in point of law enemies;⁶ so that all trading intercourse, and all contracts between them, except under express or implied⁷ license, are

¹ *Rose v. Himely*, 4 Cranch, 241; *Gelston v. Hoyt*, 3 Wheat. 246; *United States v. Hutchings*, 2 Wheeler Crim. Cas. 543. And see *Spain v. The Conception*, 2 Wheeler Crim. Cas. 597; *United States v. Skinner*, 2 Wheeler Crim. Cas. 232, 234; *United States v. Ortega*, 4 Wash. C. C. 531; *United States v. Benner*, Bald. 234; *United States v. Wagner*, Law Rep. 2 Ch. Ap. 582, 591, 593.

² *Taylor v. Carpenter*, 3 Story, 458; *Openheimer v. Levy*, 2 Stra. 1082; *Roberts v. Knights*, 7 Allen, 449; *Barrell v. Benjamin*, 15 Mass. 354.

³ *Beck v. McGillis*, 9 Barb. 35; *Greenia v. Greenia*, 14 Misso. 526.

⁴ 1 Bl. Com. 372; *Fairfax v. Hunter*, 7 Cranch, 603; *Culverhouse v. Beach*, 1 Johns. Cas. 399; *Levy v. McCartee*, 6 Pet. 102; *Fox v. Southack*, 12 Mass. 143; *Cross v. De Valle*, 1 Clif. 282; *Craig v. Leslie*, 3 Wheat. 563, 589;

Smith v. Adams, 7 Wend. 367; *Munro v. Merchant*, 28 N. Y. 1; *Stevenson v. Dunlap*, 7 T. B. Monr. 134; *Gansevoort v. Lunn*, 3 Johns. Cas. 109, 120, 121; *Wadsworth v. Wadsworth*, 2 Kernan, 376; *Haleyburton v. Kershaw*, 3 Des. 105; *Orr v. Hodgson*, 4 Wheat. 453; *Gouverneur v. Robertson*, 11 Wheat. 332; *Taylor v. Benham*, 5 How. U. S. 233.

⁵ *Bradstreet v. Oneida*, 13 Wend. 546; *Rouche v. Williamson*, 3 Ire. 141. And see *Hepburn v. Dunlop*, 1 Wheat. 179.

⁶ 1 Kent Com. 55.

⁷ As, for example, by openly residing in the country under public permission. *Boulton v. Dobree*, 2 Camp. 163; *Alciator v. Smith*, 3 Camp. 245; *Wells v. Williams*, 1 Salk. 46, 1 Ld. Raym. 282; *Otteridge v. Thompson*, 2 Cranch C. C. 108; *Parkinson v. Wentworth*, 11 Mass. 26; *Bradwell v. Weeks*, 13 Johns. 1; *Clarke v. Morey*, 10 Johns. 69. The

unlawful and void.¹ Not even will a contract wrongfully made during war be enforced on the return of peace.² From the necessities of the case, a prisoner of war may bind himself by his contract for subsistence;³ and there are various other distinctions,—on a subject seldom arising. As to the further questions, therefore, the reader is referred to the digests; except as to,—

§ 1001. **Suits during War — Peace.** — No suit on a contract, however validly made before the war began, can be carried on in the courts while it continues.⁴ But, on the return of peace, all rights revive as before the war.⁵

§ 1002. *The Doctrine of this Chapter restated.*

The doctrine of this chapter is an illustration of the broader one, that the civilized nations constitute one family, governed by a uniform law, termed international. When one sovereign or his subject is upon the hearthstone of another, the rights and amenities are equal between them, and the guest is denied nothing which the entertainer possesses. If a quarrel springs up, it pertains equally to sovereign and subject, and amenities are suspended. They return with peace, and things are restored to their former conditions.

differing cases within this principle are numerous. *Usparicha v. Noble*, 13 East, 332; *Zacharie v. Godfrey*, 50 Ill. 186.

¹ 1 Kent Com. 66, 67; *Barrick v. Buba*, 2 C. B. n. s. 563; *The Rapid*, 1 Gallis. 295; *The Eliza*, 2 Gallis. 4; *Marchand v. Coyle*, 18 La. An. 632; *Crawford v. The William Penn*, 3 Wash. C. C. 484; *Esposito v. Bowden*, 7 Ellis & B. 763, 769; *Potts v. Bell*, 8 T. R. 548; *Shotwell v. Ellis*, 42 Missis. 439.

² *Hart v. United States*, 15 Ct. of Cl. 414; *Willison v. Patteson*, 7 Taunt. 439.

³ *Crawford v. The William Penn*, supra.

⁴ *Mumford v. Mumford*, 1 Gallis. 366; *Wilcox v. Henry*, 1 Dall. 69; *Bell v. Chapman*, 10 Johns. 183; *Johnston v. Decker*, 11 Johns. 418; *Haymond v. Camden*, 22 W. Va. 180; *Sturm v. Fleming*, 22 W. Va. 404; *Casseres v. Bell*, 8 T. R. 166; *Alcinous v. Nigreu*, 4 Ellis & B. 217; *Le Bret v. Papillon*, 4 East, 502.

⁵ *Flindt v. Waters*, 15 East, 260, 265; *Harman v. Kingston*, 3 Camp. 150, 153; *Ware v. Hylton*, 3 Dall. 199; *Dunlop v. Ball*, 2 Cranch, 180.

CHAPTER XXXIX.

CORPORATIONS.

§ 1003, 1004. Introduction.

1005-1013. Power of Contract.

1014-1023. By what Methods.

1024. Doctrine of Chapter restated.

§ 1003. **What a Corporation.** — We have already seen that “a corporation is an artificial creation of the law,¹ embodying a part of the legal capabilities and responsibilities of an unincorporate man.”² Hence, —

§ 1004. **How Chapter divided.** — We have here two questions, which we shall consider in their order, I. The Corporation's Power of Contract; II. By what Methods exercised.

I. The Corporation's Power of Contract.

§ 1005. **Determined by Charter.** — The authority of a corporation to enter into contracts comes solely from its charter, or incorporating act; being either expressed therein, or implied. It has none beyond.³ And as individuals cannot exist without continually making contracts, so cannot a corporation. Therefore, —

¹ It would be equally accurate to say, that a corporation is an artificial “person,” &c. *Royal Mail Steam Packet Co. v. Braham*, 2 Ap. Cas. 381, 386; *Louisville, &c. Railroad v. Letson*, 2 How. U. S. 497. Some of the definitions are so.

² Ante, § 559.

³ *Ewing v. Toledo Sav. Bank*, 43 Ohio State, 31, 37; *Head v. Providence Ins. Co.* 2 Cranch, 127; *Beaty v. Knowl-*

er, 4 Pet. 152; *Straus v. Eagle Ins. Co.* 5 Ohio State, 59; *White's Bank v. Toledo, &c. Ins. Co.* 12 Ohio State, 601; *McMasters v. Reed*, 1 Grant, Pa. 36; *Burr v. McDonald*, 3 Grat. 215; *Madison, &c. Plank Road v. Watertown, &c. Plank Road*, 5 Wis. 173; *Weckler v. First National Bank*, 42 Md. 581; *Matthews v. Skinker*, 62 Misso. 329; *Bank of Augusta v. Earle*, 13 Pet. 519, 587; *Murphy v. Jacksonville*, 18 Fla. 318.

§ 1006. **Implied.** — Where the power of contract is not in terms given to a corporation, it is always, to some extent, implied; and, if so given, but not in adequate measure, the deficiency may be made up from implication.¹ To be more specific, —

§ 1007. **Limit of Implication.** — A corporation, being an artificial “person,” yet with capabilities less extensive than a natural one,² has, within its sphere, and in the absence of anything in the act of incorporation restraining, the same power as a natural person of making contracts.³ The books give some intimations that, to justify a contract through a power implied, it must be necessary to the carrying out of express powers; but, though such a statement of the doctrine is not practically very misleading,⁴ it is not strictly accurate.⁵ The better form is to say that, if the subject of the contract is within the corporate sphere, and the contract itself is such as an individual might make, it will be good. Thus, —

§ 1008. **Take and convey.** — A corporation may, within its sphere, take and convey real estate and other property;⁶ but not outside of its general power and purposes.⁷ So —

§ 1009. **Negotiable Paper.** — Corporations, acting within

¹ *People v. Mauran*, 5 Denio, 389; *Blanchard's Gun-stock Turning Factory v. Warner*, 1 Blatch. 258; *Bennington Iron Co. v. Rutherford*, 3 Harrison, 467; *Moss v. Averell*, 6 Selden, 449; *Cincinnati, &c. Railroad v. Clarkson*, 7 Ind. 595; *Abbott v. Baltimore, &c. Steam Packet*, 1 Md. Ch. 542; *Reynolds v. Stark*, 5 Ohio, 204; *Barry v. Merchants Exchange*, 1 Sandf. Ch. 280; *Shrewsbury v. Birmingham Railway*, 6 H. L. Cas. 113; *Talladega Ins. Co. v. Landers*, 43 Ala. 115. Whether or not the cases cited come fully up to the latter clause of the text, it is plainly correct in principle; for, otherwise, a part of the act of incorporation would be rendered practically null.

² Ante, § 1003 and note.

³ *Riche v. Ashbury Railway Carriage, &c. Co.* Law Rep. 9 Ex. 224,

264; *Richmond, &c. Railroad v. Richmond*, 26 Grat. 83; and cases in the last note.

⁴ Post, § 1013.

⁵ Met. Con. 158.

⁶ *Sutton's Hospital*, 10 Co. 23 a, 30 b; *Blanchard's Gun-stock Turning Factory v. Warner*, 1 Blatch. 258; *Barry v. Merchants Exchange*, 1 Sandf. Ch. 280; *Phillips Academy v. King*, 12 Mass. 546; *Rehoboth v. Rehoboth*, 23 Pick. 139; *Bennington Iron Co. v. Rutherford*, 3 Harrison, 467; *Leazure v. Hillegas*, 7 S. & R. 313, 320; *Buell v. Buckingham*, 16 Iowa, 284; *Indiana v. Woram*, 6 Hill, N. Y. 33.

⁷ *Lynch v. Hartwell*, 8 Johns. 422; *Occum Co. v. Sprague Manuf. Co.* 34 Conn. 529; *First Parish in Sutton v. Cole*, 3 Pick. 232.

their sphere, not otherwise, may issue and receive negotiable paper.¹ Also —

§ 1010. **Appoint Agent.** — They may appoint an agent and provide for his compensation.² Also —

§ 1011. **Borrow — Mortgage.** — They may borrow money³ and mortgage their property to secure their debts.⁴ Partly to repeat, —

§ 1012. **Within Sphere — (Ultra Vires).** — A contract not within the sphere of a corporation, as defined by its charter, is termed *ultra vires*,⁵ and sometimes *extra vires* with its correlate *intra vires*.⁶ Subject to some nice qualifications into which it is not necessary to enter here,⁷ the *ultra vires* contract is void.⁸ Now, —

§ 1013. **Other Expression of Implied.** — Leaving out of view what comes from the corporation's being deemed an artificial "person," we may reason as follows. The act of incorporation, like every other statute, will be so interpreted as to be made effectual for its purpose.⁹ And, in the absence of terms directly or impliedly forbidding,¹⁰ it will be held to invest the

¹ Met. Con. 158; Attorney-General v. Life and Fire Ins. Co. 9 Paige, 470; Moss v. Averell, 6 Selden, 449; Ketchum v. Buffalo, 4 Kernan, 356; Goodrich v. Reynolds, 31 Ill. 490; Hardy v. Merriweather, 14 Ind. 203; Came v. Brigham, 39 Maine, 35; Bacon v. Mississippi Ins. Co. 31 Missis. 116; Moss v. Oakley, 2 Hill, N. Y. 265; McCullough v. Moss, 5 Denio, 567; In re Great Western Telegraph, 5 Bis. 363.

² Cincinnati, &c. Railroad v. Clarkson, 7 Ind. 595; Berks and Dauphin Turnpike Road v. Myers, 6 S. & R., 12, 16.

³ Union Gold Mining Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248.

⁴ Gordon v. Preston, 1 Watts, 385; People v. Brown, 5 Wend. 590; Thompson v. Lambert, 44 Iowa, 239.

⁵ Webster v. Buffalo Ins. Co. 2 McCrary, 348; Watuppa Reservoir v. Mackenzie, 132 Mass. 71, 74; New Haven, &c. Co. v. Hayden, 107 Mass. 525, 530; Attorney-General v. Jamaica Pond Aqueduct, 133 Mass. 361, 362.

⁶ Ashbury Railway, &c. Co. v. Riche, Law Rep. 7 H. L. 653, 668, 672.

⁷ For example, Farmers, &c. Bank v. Detroit, &c. Railroad, 17 Wis. 372; Railroad v. Ellerman, 105 U. S. 166, 173; Auerbach v. Le Sueur Mill Co. 28 Minn. 291, 296 (compared with Scovill v. Thayer, 105 U. S. 143); Whitney Arms Co. v. Barlow, 63 N. Y. 62; Indiana v. Woram, 6 Hill, N. Y. 33, 37.

⁸ Dana v. Bank of St. Paul, 4 Minn. 385; Middlesex Railroad v. Boston, &c. Railroad, 115 Mass. 347; White's Bank v. Toledo, &c. Ins. Co. 12 Ohio State, 601; Susquehanna Canal v. Bonham, 9 Watts & S. 27; Davis v. Old Colony Railroad, 131 Mass. 258; Clinch v. Financial Corporation, Law Rep. 4 Ch. Ap. 117.

⁹ Bishop Written Laws, § 82, 137.

¹⁰ Erie's Appeal, 10 Norris, Pa. 398; Bateman v. Ashton-under-Lyne, 3 H. & N. 323; Stephenson v. Short, 92 N. Y. 433; Chambers v. Falkner, 65 Ala. 448.

corporation with simply and only the powers of contract required for the carrying out of its particular functions, within the sphere which the incorporating act has defined.¹ For the reasons already stated,² should this form of the argument be found to restrict the power of contract more than the other, it should give way to the other. It better accords with a part of the cases, yet probably not with the majority.³

II. *By what Methods exercised.*

§ 1014. **Prescribed by Charter.** — When the charter of a corporation defines its “mode of contracting,” it “must,” said Marshall, C. J., “observe that mode, or the instrument no more creates a contract than if the body had never been

¹ *Eastern Union Railway v. Hart*, 8 Exch. 116; *Pacific Railroad v. Seely*, 45 Misso. 212; *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543; *Toledo, &c. Railroad v. Rodrigues*, 47 Ill. 188; *Central Railroad v. Collins*, 40 Ga. 582; *Brooklyn Gravel Road v. Slaughter*, 33 Ind. 185; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Dupee v. Boston Water-power Co.* 114 Mass. 37; *Scovill v. Thayer*, 105 U. S. 143, 148; *Johnston v. Louisville*, 11 Bush, 527; *Williams v. Davidson*, 43 Texas, 1; *Morville v. American Tract Soc.* 123 Mass. 129; *Ottawa v. Carey*, 108 U. S. 110.

² *Ante*, § 1007.

³ Still, looking into the cases, and as a question of mere authority, there may be doubt as to which side of the scale is the heavier. I quote from the 2d ed. of *Leake Con.* 585: “A corporation or company constituted for the purpose of trading has, in general, as incident to such purpose, the power to draw and accept bills of exchange and promissory notes in the ordinary form; as the Bank of England and the East India Company. See *Murray v. East India Co.* 5 B. & Ald. 204; per cur. in *East London Waterworks v. Bailey*, 4 Bing. 283, 288. But a railway company, incorporated under an ordinary railway act, has, in general,

no power to issue bills or notes, as it is not a necessary incident to the undertaking, to have such power. *Bateman v. Mid-Wales Railway*, Law Rep. 1 C. P. 499. Nor is such a power incident to the business of a waterworks company, *Broughton v. Manchester Waterworks*, 3 B. & Ald. 1; or a cemetery company, *Steele v. Harmer*, 14 M. & W. 831.” Whether the doctrine which forbids the use of commercial paper in the circumstances stated prevails or not in the American courts, I do not propose to inquire. But this would seem to be an instance in which the conclusion differs with the reasoning selected. If the former of the two methods given in my text is the correct one, the result arrived at by the English courts in these cases is incorrect. Were the decision with me, I should hold it to be wrong. When the artificial person called a corporation is acting within its sphere, if the use of commercial paper is an appropriate, though not a necessary, means of exercising its functions, I can see no just ground why it may not as well employ such means as a natural person proceeding within his sphere. Indeed, it seems to me that most of our courts will so hold.

incorporated.”¹ Thus, if the charter requires the signature of a particular officer to its bonds, they are invalid without it.² Such is the general doctrine;³ but sometimes a provision of this sort is construed as directory only,⁴ and contracts not in the prescribed mode are held to be valid.⁵ In the absence of any such special defining of the mode, —

§ 1015. **Common Seal — (English).** — One of the ordinary powers of a corporation is to have a common seal.⁶ “For,” says Blackstone, “a corporation, being an invisible body, cannot manifest its intention by any personal act or oral discourse: it, therefore, acts and speaks only by its common seal. For, though the particular members may express their private consents to any act by words or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole.”⁷ This reasoning, which has been many times repeated by learned judges to whom it never occurred to inquire whether or not it is intrinsically effective, would, if it were good, exclude the corporation from every act of contracting; unless the chartering power manufactured and gave, as it never does, to the corporation its common seal. Surely, if it can act only by such seal, it, while it has none, cannot employ an engraver to make one. Yet this doctrine of Blackstone constitutes, to the present day, the ordinary common-law rule in England.⁸ It has its exceptions. The “principle” governing which, said Lord Denman, C. J., “appears to be convenience, amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for

¹ *Head v. Providence Ins. Co.* 2 Cranch, 127, 169.

² *Bissell v. Spring Valley*, 110 U. S. 162.

³ *Holland v. San Francisco*, 7 Cal. 361; *Osborne v. Tunis*, 1 Dutcher, 633; *Talmadge v. North American Coal, &c. Co.* 3 Head, 337.

⁴ *Southern Life Insurance, &c. Co. v. Lanier*, 5 Fla. 110. For the distinction

of mandatory and directory in statutes, and the rules governing each, see Bishop Written Laws, § 254–256.

⁵ *Witte v. Derby Fishing Co.* 2 Conn. 260; *Bulkley v. Derby Fishing Co.* 2 Conn. 252.

⁶ 2 Kent Com. 277.

⁷ 1 Bl. Com. 475.

⁸ *Leake Con.* 588.

which the corporation was created, the exception has prevailed: hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon.”¹

§ 1016. *Continued* — (American). — So much of the foregoing doctrine as authorizes the corporation to have a common seal prevails with us. And ordinarily, in practice, it establishes such seal, and has it engraved, presenting a uniform appearance. It can be proved, in a judicial proceeding, by any one acquainted with it;² and the *prima facie* legal inference will be, that it was placed on the instrument by competent authority;³ so a manifest convenience results therefrom. Yet, in matter of law, if the corporation has not so established a common seal, any seal which it employs for the occasion will suffice.⁴ Contrary to the English doctrine, it is the ordinary and nearly universal American, that any act which an unincorporate person can perform without seal is equally good without, if done by a corporation, and is within its jurisdiction, unless its charter provides otherwise.⁵

¹ *Church v. Imperial Gaslight, &c. Co.* 6 A. & E. 846, 861; *Ludlow v. Charlton*, 6 M. & W. 815, 822. And see *Diggle v. London, &c. Railway*, 5 Exch. 442, 450.

² *City Council v. Moorhead*, 2 Rich. 430.

³ *Indianapolis, &c. Railroad v. Morganstern*, 103 Ill. 149; *Evans v. Lee*, 11 Nev. 194; *Reed v. Bradley*, 17 Ill. 321; *Leggett v. New Jersey Manuf. &c. Co.* Saxton, 541; *Lovett v. Steam Saw Mill Assoc.* 6 Paige, 54.

⁴ *Miller v. Superior Machine Co.* 79 Ill. 450; *Taylor v. Heggie*, 83 N. C. 244; *Porter v. Androscoggin, &c. Railroad*, 37 Maine, 349; *Stebbins v. Merritt*, 10 Cush. 27; *Milldam Foundry v. Hovey*, 21 Pick. 417; *Ransom v. Stonington, &c. Bank*, 2 Beasley, 212; *South*

Baptist Soc. v. Clapp, 18 Barb. 35; *Crossman v. Hilltown, &c. Co.* 3 Grant, Pa. 225.

⁵ *Blunt v. Walker*, 11 Wis. 334; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Chesapeake and Ohio Canal v. Knapp*, 9 Pet. 541; *Board of Education v. Greenebaum*, 39 Ill. 609; *Ross v. Madison*, 1 Ind. 281; *Merrick v. Burlington, &c. Plank Road*, 11 Iowa, 74; *Petrie v. Wright*, 6 Sm. & M. 647; *Buckley v. Briggs*, 30 Misso. 452; *Chestnut Hill Turnpike v. Rutter*, 4 S. & R. 6; *Fourth School District v. Wood*, 13 Mass. 193, 199; *Bank of United States v. Dandridge*, 12 Wheat. 64; *Mott v. Hicks*, 1 Cow. 513; *National Banking, &c. Co. v. Knap*, 55 Misso. 154; *Christian Church v. Johnson*, 53 Ind. 273, 275.

So that what the laws require to be by deed must be under the common seal of the corporation, either general or adopted for the particular occasion, affixed by one authorized.¹ But where a parol contract would be valid if made by a natural person, the corporation may contract by parol.² Within this principle it may, for example, without seal, bind itself in writing to sell real estate.³

§ 1017. **By whom.** — A corporation may in the proper circumstances contract by resolution,⁴ ordinarily by agent,⁵ or always by its duly authorized officers.⁶ The methods vary, and the practitioner should look into the structure of the particular corporation.

§ 1018. **Form of Written Contract.** — Since it is competent for the officer or agent to contract on behalf of himself instead of the corporation, the undertaking ought to be in terms the corporation's, not his own.⁷ For example, "We promise to pay," &c., signed by several persons, with the words "Trustees of the First Church," &c., added to their names, was adjudged to constitute their individual note.⁸ But a bill of exchange headed "Office of the A Co." and concluding "charge the same to account of A Co., X. Pres't,

¹ *Hatch v. Barr*, 1 Ohio, 390; *Koehler v. Black River Falls Iron Co.* 2 Black, 715; *Osborne v. Tunis*, 1 Dutcher, 633; *Eagle Woolen Mills v. Monteith*, 2 Oregon, 277. See *Union Bank v. Call*, 5 Fla. 409; *Johnston v. Crawley*, 25 Ga. 316; *Phillips v. Coffee*, 17 Ill. 154; *Tenney v. East Warren, &c. Co.* 43 N. H. 343; *Josey v. Wilmington, &c. Railroad*, 12 Rich. 134; *University of Michigan v. Detroit, &c. Soc.* 12 Mich. 138; *Kinzie v. Chicago*, 2 Scam. 187.

² *Selma v. Mullen*, 46 Ala. 411; *Bank of Columbia v. Patterson*, *supra*; *Chesapeake and Ohio Canal v. Knapp*, *supra*.

³ *The Banks v. Poitiaux*, 3 Rand. 136; *Legrand v. Sidney College*, 5 Munf. 324.

⁴ *Soldiers Orphans Home v. Shaffer*, 63 Ill. 243; *St. Louis Bank v. Grand Lodge*, 98 U. S. 123; *American Bank*

v. Baker, 4 Met. 164, 176; *Essex Turnpike v. Collins*, 8 Mass. 292, 298.

⁵ *New Athens v. Thomas*, 82 Ill. 259; *McCullough v. Talladega Ins. Co.* 46 Ala. 376; *Cincinnati, &c. Railroad v. Clarkson*, 7 Ind. 595; *Berks and Dauphin Turnpike Road v. Myers*, 6 S. & R. 12; *Andover, &c. Turnpike v. Hay*, 7 Mass. 102, 107.

⁶ *Reuter v. Electric Telegraph*, 6 Ellis & B. 341; *Walker v. Detroit Transit Railway*, 47 Mich. 338; *Dubuque, &c. College v. Dubuque*, 13 Iowa, 555.

⁷ *Willson v. Nicholson*, 61 Ind. 241; *Baldwin v. Canfield*, 26 Minn. 43; *Furnivall v. Coombes*, 6 Scott, N. R. 522, 7 Jur. 399; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250; *Parr v. Greenbush*, 72 N. Y. 463.

⁸ *Hayes v. Brubaker*, 65 Ind. 27. To the like effect, *McClellan v. Robe*, 93 Ind. 298.

Y. Sec'y," was deemed the company's.¹ And the like construction was put upon "I promise, &c., for the Providence Hat Manufacturing Company," signed simply "Frink Roberts;" it was held to be the company's note.² Assuming a deed to be on its face the corporation's, "the technical mode of executing" it, said a learned judge, "is to conclude the instrument, which should be signed by some officer or agent in the name of the corporation, with: 'In testimony whereof the common seal of said corporation is hereunto affixed,' and then to affix the seal."³ Yet formal departures, where the substance is preserved, will be disregarded.⁴ Where the deed is of a sort requiring an acknowledgment, and the statutes are silent as to a corporation, it should proceed from the officer attaching the seal.⁵

§ 1019. **Under Seal — Parol Written — Oral.** — There are distinctions, with differences of judicial opinion, between cases where the contract is a specialty, and where it is a writing without seal, or is oral. But there is nothing in these distinctions peculiar to the law of corporations, and they are sufficiently explained in other connections.⁶

§ 1020. **Created and Implied.** — The law can and does create and imply contracts against corporations, the same as against individuals.⁷

¹ *Hitchcock v. Buchanan*, 105 U. S. 416.

² *Emerson v. Providence Hat Manuf. Co.* 12 Mass. 237. And see *Aimen v. Hardin*, 60 Ind. 119.

³ *Bason v. King's Mountain Mining Co.* 90 N. C. 417, 421, by Smith, C. J.

⁴ *Moore v. Willamette Transp., &c. Co.* 7 Oregon, 359; *Kansas v. Hannibal, &c. Railroad*, 77 Misso. 180; *Whitford v. Laidler*, 94 N. Y. 145; *Indianapolis, &c. Railroad v. Morganstern*, 103 Ill. 149; *Reed v. Home Sav. Bank*, 127 Mass. 295; *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543; *Savannah, &c. Railroad v. Lancaster*, 62 Ala. 555; *Chicago, &c. Railroad v. Lewis*, 53 Iowa, 101; *Scanlan v. Keith*, 102 Ill. 634; *Murphy v. Welch*, 128 Mass. 489, 491. In *Bason v. King's Mountain Mining Co.* supra, it

was adjudged adequate to say, "In witness whereof the said G company have caused this indenture to be signed by their president, and attested by their secretary, and their common seal to be affixed hereto. G. C. Walker, President. Attest: George Bull, Secretary." In *Haven v. Adams*, 4 Allen, 80, the following was sustained: "In testimony whereof, said party of the first part have caused these presents to be signed by their president, and their common seal to be hereto affixed, and said parties of the second part have hereto set their hands and seals, the day and year first above written. Sam'l S. Lewis, President (seal), Robert G. Shaw (seal)," &c.

⁵ *Kelly v. Calhoun*, 95 U. S. 710.

⁶ *Ante*, § 426, 994.

⁷ *Dunn v. St. Andrews Church*, 14

§ 1021. **Fraud.** — A corporation, like an individual, may be guilty of fraud in its contract, and with the same consequences.¹

§ 1022. **Contracting with Self.** — The rule that one cannot contract with himself² doubtless applies to a corporation. But this artificial person exists distinct and apart from the natural persons who are its members, stockholders, and officers; therefore there is ordinarily no impediment to a contract between it and one of them.³ Even two corporations may bargain together, at least in special circumstances, where some of the participants are officers of both.⁴ Still there are qualifications of this doctrine, proceeding from statutes, from the common-law rule that a person in one capacity cannot enter into a contract with himself in another capacity,⁵ from the fiduciary relation of the individual to the corporation,⁶ and the like, either rendering the attempted contract a nullity, or qualifying its effect, — cases not all of which are governed specially by the law of corporations.⁷

§ 1023. **Estoppel.** — Something of the application of the law of estoppel to corporations has already been considered.⁸ The general doctrine, that a corporation may be estopped the same as an individual,⁹ is subject to the general modification

Johns. 118; Danforth v. Schoharie, &c. Turnpike, 12 Johns. 227; Board of Education v. Greenebaum, 39 Ill. 609; Ross v. Madison, 1 Ind. 281; Merrick v. Burlington, &c. Plank Road, 11 Iowa, 74; Petrie v. Wright, 6 Sm. & M. 647; Buckley v. Briggs, 30 Misso. 452; Canal Bridge v. Gordon, 1 Pick. 297; McMasters v. Reed, 1 Grant, Pa. 36; Smith v. First Cong. Meetinghouse, 8 Pick. 178; New Athens v. Thomas, 82 Ill. 259; Goodwin v. Union Screw Co. 34 N. H. 378; Sheldon v. Fairfax, 21 Vt. 102.

¹ Cragie v. Hadley, 99 N. Y. 131; Union Pacific Railroad v. Credit Mobilier, 135 Mass. 367; Hedges v. Paquett, 3 Oregon, 77; White Mountains Railroad v. White Mountains (N. H.) Railroad, 50 N. H. 50.

² Ante, § 29, 880.

³ Revere v. Boston Copper Co. 15 Pick. 351, 363; Merrick v. Peru Coal Co. 61 Ill. 472; Tell City Furniture Co. v. Nees, 63 Ind. 245.

⁴ Griffin v. Inman, 57 Ga. 370.

⁵ Ante, § 881.

⁶ Ante, § 740.

⁷ Foster v. Oxford, &c. Railway, 13 C. B. 200, 17 Jur. 167; Aberdeen Railway v. Blakie, 1 Macq. Ap. Cas. 461; Sheffield, &c. Railway v. Woodcock, 7 M. & W. 574; Port v. Russell, 36 Ind. 60; Macon v. Huff, 60 Ga. 221; Read v. Smith, 60 Texas, 379; Hedges v. Paquett, 3 Oregon, 77; Pennsylvania Railroad's Appeal, 30 Smith, Pa. 265.

⁸ Ante, § 286, 304, 310.

⁹ Ante, § 310; Stratton v. Lyons, 53 Vt. 130.

that a contract *ultra vires*¹ cannot be imposed upon it in this way.² Yet, as an exception to this modification, it is one of the already-mentioned³ qualifications of the nullity of the *ultra vires* contract, that the courts in a variety of cases, probably not reducible to a rule, suffer the estoppel to cast on the corporation an obligation not quite within the sphere ordained for it by the legislature.⁴

§ 1024. *The Doctrine of this Chapter restated.*

A corporation, being an artificial person, can, like a natural one, enter into contracts. But, since it is created for specific purposes, and is endowed with only a part of what pertains to individuals, its powers of contract are limited by the objects for which it was brought into existence. Yet, while it must follow its charter, it may, if not restrained thereby, make its bargains by forms and methods similar to those employed by individuals; the chief distinction as to contract being, that its sphere of action is narrower than theirs.

¹ Ante, § 1012.

² Webster v. Buffalo Ins. Co. 2 McCrary, 348; Scovill v. Thayer, 105 U. S. 143; Chambers v. Falkner, 65 Ala. 448; Bissell v. Spring Valley, 110 U. S. 162.

³ Ante, § 1012.

⁴ See and compare Leslie v. Urbana,

8 Bis. 435; Auerbach v. Le Sueur Mill, 28 Minn. 291; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Close v. Glenwood Cemetery, 107 U. S. 466; Morris Commissioners v. Hinchman, 31 Kan. 729; National Trust Co. v. Miller, 6 Stew. Ch. 155; Gillespie v. Fort Wayne, &c. Railroad, 17 Ind. 243.

CHAPTER XL.

CONTRACTS MADE THROUGH AGENTS.

- § 1025. Introduction.
- 1026-1033. General Doctrine.
- 1034-1041. Who may be Agent.
- 1042-1049. How Agency created.
- 1050-1056. How terminated.
- 1057-1068. Express and Implied Powers of Agent.
- 1069-1090. Manner and Forms of the Contract.
- 1091-1110. Unauthorized, and Ratification.
- 1111-1115. Frauds by and to Agents.
- 1116-1121. Rights and Liabilities of Agents.
- 1122. Doctrine of Chapter restated.

§ 1025. **How Chapter divided.** — We shall consider, I. The General Doctrine of Agency ; II. Who may be the Agent ; III. How the Agency is created ; IV. How the Agency is terminated ; V. The Express and Implied Powers of the Agent ; VI. The Manner and Forms of the Contract by Agent ; VII. Unauthorized Contracts and their Ratification ; VIII. Frauds by and to Agents ; IX. The Rights and Liabilities of Agents.

I. *The General Doctrine of Agency.*

§ 1026. **In Brief.** — It appears to be the doctrine of the books, that a part or all of the infant's limited capability of contract can be exercised by him only in person.¹ But, for parties with complete legal capacity, the rule nearly or quite universal is, that whatever one can do in person he

¹ Ante, § 930.

can do by agent, and with the same effect. *Qui facit per alium facit per se.*¹

§ 1027. **Defined.** — An agent is one who acts for and in the stead of another, termed the principal,² either generally or in some particular business or thing, and either after his own discretion in full or in part, or under a specific command.³ To illustrate the nature of an agency, —

§ 1028. **Notice — Knowledge.** — Notice given to an agent, while acting in the agency, is notice to the principal.⁴ And ordinarily the agent's knowledge is, in like circumstances, the principal's.⁵ But knowledge obtained by an attorney while serving another person has been deemed not to be the equivalent of notice to the client.⁶ On the other hand, knowledge of an agent, acquired before he became such, yet present in his mind while carrying out the agency, has been adjudged to be notice to the principal.⁷ Again, —

§ 1029. **Payment** — to the agent is payment to the principal.⁸ But the debtor's release to the agent, of what the latter owes him, cannot be such; for neither in fact nor in appearance is this transaction authorized by the principal.⁹

§ 1030. **Possession.** — The possession of a thing by a servant or other agent is the possession also of the master or principal.¹⁰

§ 1031. **Making Contract.** — The agent's act of bargaining for his principal is the principal's act.¹¹ And a promise made to the agent is a promise to the principal.¹²

§ 1032. **In Pleading,** — a thing which one has done by his

¹ Broom Leg. Max. 2d Eng. ed. 645 et seq.; Story Agency, § 2, 6; 1 Bishop Crim. Law, § 673.

² 2 Bishop Crim. Law, § 333.

³ Compare with Story Agency, § 3.

⁴ Pringle v. Dunn, 37 Wis. 449; Mountford v. Scott, 3 Madd. 34; Vermont Mining and Quarrying Co. v. Windham County Bank, 44 Vt. 489; Memphis, &c. Railway v. Koch, 28 Kan. 565; Saulsbury v. Wimberly, 60 Ga. 78; Drake v. Barker, 54 Vt. 372; McNamara v. McNamara, 62 Ga. 200.

⁵ Corliss v. Smith, 53 Vt. 532;

Tagg v. Tennessee Nat. Bank, 9 Heisk. 479.

⁶ Herrington v. McCollum, 73 Ill. 476.

⁷ Lebanon Savings Bank v. Hollenbeck, 29 Minn. 322.

⁸ McCrary v. Ashbaugh, 44 Misso. 410; Ely v. Harvey, 6 Bush, 620; Yates v. Freckleton, 2 Doug. 623.

⁹ Mitchell v. Printup, 68 Ga. 675.

¹⁰ Goodwin v. Garr, 8 Cal. 615; Jowers v. Blandy, 58 Ga. 379; 2 Bishop Crim. Law, § 824.

¹¹ Cooke v. Seeley, 2 Exch. 746.

¹² Kirby v. Mills, 78 N. C. 124.

agent may be charged as done by himself, nor need there be any mention of the agent or agency.¹ For example, an averment in a declaration that A accepted a bill is supported by proof that B his agent accepted it; thus, "for A, B."² And an allegation that the plaintiff delivered a specified quantity of milk to the defendant, at his request, is sustained by proof that the milk was delivered to the defendant's wife, while living apart from him, under circumstances compelling him to pay therefor.³ But if a pleader needlessly states that an indorsement, which in fact was by procuration, was made by the defendant's "own proper hand writing being thereto subscribed," this will be ill for the variance.⁴

§ 1033. **Sorts of Agent.** — There are many different kinds of agent, such as broker, attorney, auctioneer, clerk, and the like; some of which are known by the more specific name, and others can be designated only as agents. Accurately considered, all are governed by one law; but they differ in that their presumed authority varies with the sort, or name. The particulars will appear as we proceed.

II. *Who may be the Agent.*

§ 1034. **Any Capable Person,** — that is, one competent to act for himself, — may be an agent.⁵ So, also, —

§ 1035. **Married Woman — Husband — Minor.** — A *feme covert*⁶ or a minor,⁷ of sufficient actual capacity, may be an agent, the civil disabilities not disqualifying. And where, as under recent statutes, the wife has the power of contracting on her own account, her husband may be her agent therefor.⁸ It was always common for the wife to be the husband's agent.⁹ But —

¹ 1 Bishop Crim. Proc. § 332.

² Heys v. Heseltine, 2 Camp. 604.

³ Benjamin v. Dockham, 134 Mass.

418.

⁴ Levy v. Wilson, 5 Esp. 180.

⁵ Lea v. Bringier, 19 La. An. 197.

⁶ 1 Bishop Mar. Women, § 701; 2

Ib. § 400-414; Hopkins v. Mollinieus,

⁴ Wend. 465; Singleton v. Mann, 3

Misso. 464; Butler v. Price, 110 Mass.

97; Brouer v. Vandenburg, 31 Barb.

648.

⁷ Talbot v. Bowen, 1 A. K. Mar. 436.

⁸ Arnold v. Spurr, 130 Mass. 347;

Jones v. Read, 1 La. An. 200.

⁹ 1 Bishop Mar. Women, as above;

Hopkins v. Mollinieus, supra; Eng-

mann v. Immel, 59 Wis. 249.

§ 1036. **Insane Person.** — An insane person cannot be an agent,¹ because incapable either of exercising a discretion or following instructions.

§ 1037. *Functions compatible and incompatible* : —

Agent for Two or More. — One may be an agent for two or more persons, when not required to do incompatible things;² as —

§ 1038. **Auctioneer — Broker.** — An auctioneer, who is the agent of the seller, becomes also the agent of the buyer whose bid he accepts, to the extent that he can make for both parties the memorandum required by the Statute of Frauds.³ And it is the same with a broker.⁴ But —

§ 1039. **Party, and Agent for Opposite Party.** — One cannot be both a party, and agent for the opposite party;⁵ as, to sign both for the latter and himself the memorandum required by the Statute of Frauds.⁶ And it is the same though he is an auctioneer, selling goods of which he is personally the general owner.⁷ Therefore, also, —

§ 1040. **Dealing with Self.** — A factor or other agent to sell cannot buy of himself the goods of his principal, which he has for sale.⁸ And, —

§ 1041. **Agent for both Parties, with Discretion.** — If there is a discretion to be exercised in a dealing, the same person cannot be the agent of both parties; for it is inconsistent that a man should bargain with himself.⁹

¹ Story Agency, § 7; post, § 1055.

² Hinckley v. Arey, 27 Maine, 362; Scott v. Mann, 36 Texas, 157; Cottom v. Holliday, 59 Ill. 176. See Walker v. American National Bank, 49 N. Y. 659.

³ Simon v. Motivos, 3 Bur. 1921, 1 W. Bl. 599; Fairbrother v. Prattent, Dan. 64; Kemeys v. Proctor, 3 Ves. & B. 57; Emmerson v. Heelis, 2 Taunt. 38; Walker v. Herring, 21 Grat. 678; White v. Proctor, 4 Taunt. 209; Pike v. Balch, 38 Maine, 302; Horton v. McCarty, 53 Maine, 394.

⁴ Rucker v. Cammeyer, 1 Esp. 105.

⁵ Campbell v. Murray, 62 Ga. 86.

⁶ Sharman v. Brandt, Law Rep. 6 Q. B. 720.

⁷ Bent v. Cobb, 9 Gray, 397.

⁸ Ante, § 880, 881; Keighler v. Savage Manuf. Co. 12 Md. 383; Martin v. Moulton, 8 N. H. 504; Scott v. Mann, 36 Texas, 157; Adams v. Sayre, 70 Ala. 318.

⁹ Ex parte Bennett, 10 Ves. 381; Copeland v. Mercantile Ins. Co. 6 Pick. 198, 204; Utica Ins. Co. v. Toledo Ins. Co. 17 Barb. 132; New York Central Ins. Co. v. National Protection Ins. Co. 4 Kernan, 85. And see Capener v. Hogan, 40 Ohio State, 203.

III. *How the Agency is created.*

§ 1042. **In General.** — The methods are as various as those of entering into contracts. Thus, —

§ 1043. **The Law** — may create an agency; as, where it authorizes the wife to pledge her husband's credit, even though in fact he dissents.¹

§ 1044. **Implication.** — The most common of all methods is where one by his conduct, or by words employed with a different object primarily in view, makes another in matter of law his agent. But this sort of question is for subsequent sub-titles.²

§ 1045. **Specialty.** — An authority to an agent to execute, in the absence of the principal, an instrument under seal, must in all instances be itself under seal. It can be conferred in no other way. For the authorization must be by a writing of as high a nature as the one to be executed.³ But, —

§ 1046. **Instrument not requiring Seal — Surplus Seal.** — A seal unduly attached to an instrument is a mere redundancy; therefore, in law, such an instrument, being deemed without seal, is a simple contract, not a specialty.⁴ So that the agent's authorization to execute it, or any contract not legally required to be sealed, need not be under seal.⁵ An illustrative consequence of which is, that one having an unsealed power to sell land can make the sale, but not the conveyance;

¹ Ante, § 235, 949; Benjamin v. Dockham, 134 Mass. 418.

² Post, § 1057 et seq., 1091 et seq.

³ Harshaw v. McKesson, 65 N. C. 688; Rowe v. Ware, 30 Ga. 278; Maus v. Worthing, 3 Scam. 26; Rhode v. Louthain, 8 Blackf. 413; McMurtry v. Frank, 4 T. B. Monr. 39; Mitchell v. Sproul, 5 J. J. Mar. 264; Wheeler v. Nevins, 34 Maine, 54; Baker v. Freeman, 35 Maine, 485; Shuetze v. Bailey, 40 Misso. 69; Smith v. Perry, 5 Dutcher, 74; Kime v. Brooks, 9 Ire. 218; Gage v. Gage, 10 Fost. N. H. 420; Butterfield v. Beall, 3 Ind. 203; Cain v. Heard,

1 Coldw. 163; Hanford v. McNair, 9 Wend. 54; Gordon v. Bulkeley, 14 S. & R. 331; Blood v. Goodrich, 9 Wend. 68; Cooper v. Rankin, 5 Binn. 613; Banorgee v. Hovey, 5 Mass. 11; Spurr v. Trimble, 1 A. K. Mar. 278; Worrall v. Munn, 1 Selden, 229; Tappan v. Redfield, 1 Halst. Ch. 339; Smith v. Dickinson, 6 Humph. 261; Berkeley v. Hardy, 8 D. & R. 102, 5 B. & C. 355; McMurtry v. Brown, 6 Neb. 368; Elliott v. Stocks, 67 Ala. 336.

⁴ Ante, § 394.

⁵ Wagoner v. Watts, 15 Vroom, 126. And see post, § 1096.

because the former may be without seal, not the latter.¹ Moreover, —

§ 1047. **In Presence of Principal.** — What one does in the presence of another, whose will concurs therein, is in law the latter's personal act.² Therefore if a party verbally authorizes any individual standing by to affix his name and seal to a written contract, or tacitly consents thereto, and it is done in his presence, the execution is his own, not the agent's for him, precisely the same as though it were by his own hand. No authorizing seal is necessary.³

§ 1048. **Corporation Deed.** — A corporation has no bodily presence, and it can act only by its officers and other agents. Consequently, when it makes its deed,⁴ the authority to the person who affixes the common seal need not be under seal; since all the presence it is capable of is with its agent through whom it is acting. It could in no other manner put its seal to a power of attorney.⁵

§ 1049. **Simple Contracts in Writing.** — Since all actual contracts not under seal, whether by spoken or written words, are of the one grade called parol or simple,⁶ any unsealed undertaking may be executed by an agent verbally authorized. And it is immaterial whether such contract is itself oral or in writing; or, if the latter, whether or not there is a statute, like the Statute of Frauds, making writing essential to its validity.⁷ The authority may even be inferred from circumstances.⁸

¹ *Watson v. Sherman*, 84 Ill. 263.

² 1 Bishop Crim. Law, § 648.

³ Ante, § 112, 345; *Harshaw v. McKesson*, 65 N. C. 688; *Ball v. Dunster-ville*, 4 T. R. 313; *Mackay v. Blood-good*, 9 Johns. 285; *McMurtry v. Brown*, 6 Neb. 368.

⁴ Ante, § 315, 1016, 1019; *Stow v. Wyse*, 7 Conn. 214.

⁵ See, for illustration, *Burrill v. Nahant Bank*, 2 Met. 163.

⁶ Ante, § 26, 27, 159, 163, 180.

⁷ *Heard v. Pilley*, Law Rep. 4 Ch. Ap. 548; *Long v. Hartwell*, 5 Vroom, 116; *Yerby v. Grigsby*, 9 Leigh, 387; *Emerson v. Providence Hat Manuf. Co.*

12 Mass. 237, 240; *Shaw v. Nudd*, 8 Pick. 9; *Small v. Owings*, 1 Md. Ch. 363; *Deverell v. Bolton*, 18 Ves. 505, 509; *Mortlock v. Buller*, 10 Ves. 292, 311; *Kemeys v. Proctor*, 3 Ves. & B. 57; *Emmerson v. Heelis*, 2 Taunt. 38; *Rucker v. Cammeyer*, 1 Esp. 105; *Coles v. Trecothick*, 9 Ves. 234, 250; *Challoner v. Bouck*, 56 Wis. 652; *Barker v. Garvey*, 83 Ill. 184; *Miles v. Cook*, 1 Grant, Pa. 58.

⁸ *Trundy v. Farrar*, 32 Maine, 225; *Pole v. Leask*, 9 Jur. n. s. 829; *McDonough v. Heyman*, 38 Mich. 334; *Hull v. Jones*, 69 Misso. 587; *Shaw v. Hall*, 134 Mass. 103.

IV. *How the Agency is terminated.*

§ 1050. **At Pleasure — (How).** — An agent may generally withdraw from the service at pleasure;¹ though, if he thereby violates his contract, he will be liable to the principal in damages.² In like manner, ordinarily the principal may discharge the agent at will.³ And he may do it by parol, even where the agency is conferred by an instrument under seal.⁴ Nor is the rule different though, on the face of the instrument, the authority to the agent is irrevocable.⁵ But, —

§ 1051. **Agency coupled with Interest.** — If the agent has an interest of his own in the execution of the agency, — as where, after selling property or collecting money for his principal, he is to reserve out of his receipts payment for a debt which the principal owes him; or, if his interest is in the thing itself to which the agency relates, — as, where he is mortgagee under a power of sale mortgage (such agency being termed, when of the latter sort, and by some also when of the former, an agency coupled with an interest), — the principal cannot revoke it to the injury of the agent, who, in spite of an attempted revocation, may, for his own protection, still perform the act.⁶

¹ *Coffin v. Landis*, 5 Philad. 176; *Conrey v. Brandegee*, 2 La. An. 132. See ante, § 837.

² *Story Agency*, § 478; *United States v. Jarvis, Daveis*, 274.

³ *Smart v. Sandars*, 3 C. B. 380; *Trumbull v. Nicholson*, 27 Ill. 149; *Brookshire v. Vancannon*, 6 Ire. 231; *Phillips v. Howell*, 60 Ga. 411.

⁴ *Brookshire v. Brookshire*, 8 Ire. 74; *Blackstone v. Buttermore*, 3 Smith, Pa. 266.

⁵ *MacGregor v. Gardner*, 14 Iowa, 326.

⁶ *Hunt v. Rousmanier*, 8 Wheat. 174; *Varnum v. Meserve*, 8 Allen, 158; *Whitehead v. Lord*, 7 Exch. 691; *Watson v. King*, 4 Camp. 272; *Gausson v. Morton*, 10 B. & C. 731; *Bromley v. Holland*, 7 Ves. 3; *Smart v. Sandars*,

3 C. B. 380; *Hutchins v. Hebbard*, 34 N. Y. 24; *Wheeler v. Knaggs*, 8 Ohio, 169, 172; *Marzion v. Pioche*, 8 Cal. 522; *Posten v. Rasette*, 5 Cal. 467; *Hynson v. Noland*, 14 Ark. 710; *Barr v. Schroeder*, 32 Cal. 609; *Bonney v. Smith*, 17 Ill. 531; *Hartley's Appeal*, 3 Smith, Pa. 212; *Blackstone v. Buttermore*, 3 Smith, Pa. 266; *Daugherty v. Moon*, 59 Texas, 397; *Walsh v. Whitcomb*, 2 Esp. 565; *Abbott v. Stratten*, 3 Jones & La. T. 603. **What an Interest.** — Expenditures by the agent in carrying out the agency do not, within the meaning of this rule, create an interest preventing revocation. The principal may, at will, revoke the agency notwithstanding. *Simpson v. Lamb*, 17 C. B. 603, 2 Jur. N. S. 91. Thus, the owner of land containing iron ore authorized its sale by an agent

§ 1052. **Death.** — The death of either party terminates the agency;¹ that of the agent, because a dead man can perform no act; that of the principal, because his earthly existence has ceased, and in the nature of things there can be no agent without a principal.² Even —

§ 1053. **Unknown to Agent.** — Though the death of the principal is unknown to the agent, so that the latter executes in good faith what he believes to be a continuing agency, such execution is void.³ This consequence is carried so far that, if a verdict is rendered in court, and a judgment entered thereon, then it is discovered that the party died the night before the trial, the proceeding will be set aside,⁴ — a rule which has some qualifications, and is subject to *nunc pro tunc* judgments, questions not for this place.⁵

who was to transport specimens of the ore to England, advertise it there, and, as compensation, to have "an undivided one fourth interest in the proceeds of sale, when sold;" and it was held that this authority was not coupled with an interest, therefore was revocable at any time before sale. Said Somerville, J.: "He had no interest in the subject matter of his agency, the land itself. He was interested only in the money to be derived as the proceeds of the sale of the land, which could only be realized by the completion of his agency, or by some negotiation which was tantamount to it. He had parted with no money, or other value, for the security of which the power of sale was conferred in the agreement. He had risked in the venture of his agency only his personal services, and the expenses incidental to its execution. The undertaking to transport specimens of iron ore to England, and to advertise the lands there, may be embraced as a part of the ordinary expense to be incurred in the usual course of such an employment. It is fair to presume that he risked this much in view of the large compensation to be reaped as commissions, in the event of a successful sale." *Chambers v. Seay*, 73 Ala. 372, 378.

¹ See ante, § 588, 590, 600, 858, 861, 886.

² *Saltmarsh v. Smith*, 32 Ala. 404; *Boone v. Clarke*, 3 Cranch, C. C. 389; *Scruggs v. Driver*, 31 Ala. 274; *McDonald v. Black*, 20 Ohio, 185; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Gale v. Tappan*, 12 N. H. 145; *Turnan v. Temke*, 84 Ill. 286; *Amore v. La Mothe*, 5 Abb. N. C. 146; *Darr v. Darr*, 59 Iowa, 81; *Campanari v. Woodburn*, 15 C. B. 400, 1 Jur. n. s. 17; *Lehigh Coal, &c. Co. v. Mohr*, 2 Norris, Pa. 228; *Wallace v. Cook*, 5 Esp. 117.

³ *Davis v. Windsor Savings Bank*, 46 Vt. 728; *Galt v. Galloway*, 4 Pet. 332, 344; *Bank of Washington v. Peirson*, 2 Cranch, C. C. 685; *Travers v. Crane*, 15 Cal. 12; *Wilson v. Edmonds*, 4 Fost. N. H. 517; *Rigs v. Cage*, 2 Humph. 350; *Peries v. Aycinena*, 3 Watts. & S. 64; *Lewis v. Kerr*, 17 Iowa, 73; *Cleveland v. Williams*, 29 Texas, 204; *Blades v. Free*, 9 B. & C. 167; *Smout v. Ilbery*, 10 M. & W. 1.

⁴ *Taylor v. Harris*, 3 B. & P. 549.

⁵ *Jacobs v. Miniconi*, 7 T. R. 31; *Turner v. London, &c. Railway*, Law Rep. 17 Eq. 561; *Erie Railway v. Ackerson*, 4 Vroom, 33; *Bigelow v. Renker*, 25 Ohio State, 542; *In re Beckwith*, 87 N. Y. 503.

§ 1054. **Coupled with Interest.**—If the agency is coupled with an interest, as already explained,¹ the death cannot, on just principles, take from the agent his rights. Still, in a court of law, it will necessarily be held to terminate the agency, notwithstanding the interest, in all those circumstances in which the act of agency can be performed only in the name of the principal; for, exclaimed Lord Ellenborough, “How can a valid act be done in the name of a dead man?”² But where, by the rules of law, the agency can be executed in the agent’s own name,—as, where he has a general or special ownership in the thing,—death, the agency being thus coupled with an interest, does not end the agent’s power.³ And in other circumstances equity ought to furnish relief, though it is difficult precisely to define on the authorities when it will: thus, if A, who has agreed to sell land to B, dies, equity, holding the heirs of the former to be trustees of the latter,⁴ will compel them to fulfil the agreement;⁵ in like manner, if, for a valuable consideration, A had given B a power of attorney to convey the land, equity should, as a question of just legal principle, compel his heirs to renew the power, or make the conveyance to the person designated by A.⁶

§ 1055. **Insanity.**—Plainly the agent’s insanity, if full and profound, terminates the agency; for he now lacks the discretion which its execution requires. And, since the insanity of the principal disqualifies him to exercise the ordinary power of revocation, which is a main incident of a mere naked agency, it also, in reason, puts an end to the agent’s authority.

¹ Ante, § 1051.

² *Watson v. King*, 4 Camp. 272, 274; *Clayton v. Merrett*, 52 Missis. 353.

³ *Moore v. Hall*, 48 Mich. 143; *Bennett v. Stoddard*, 58 Iowa, 654.

⁴ *Darris’s Case*, 3 Salk. 85.

⁵ 1 Story Eq. § 788, 789; *Barnard v. Macy*, 11 Ind. 536; *Newton v. Swazey*, 8 N. H. 9; *Tilton v. Tilton*, 9 N. H. 385; *Hill v. Ressegieu*, 17 Barb. 162.

⁶ On the entire subject of this sec-

tion, consult Story Agency, § 483, 488-490; *Hunt v. Rousmanier*, 8 Wheat. 174; *Lepard v. Vernon*, 2 Ves. & B. 51; *Varnum v. Meserve*, 8 Allen, 158; *McGriff v. Porter*, 5 Fla. 373; *Houghtaling v. Marvin*, 7 Barb. 412; *Bergen v. Bennett*, 1 Caines Cas. 1; *Robertson v. Paul*, 16 Texas, 472; *Buchanan v. Monroe*, 22 Texas, 537; *Van Bergen v. Demarest*, 4 Johns. Ch. 37; *Speer v. Hadduck*, 31 Ill. 439.

And, as applied to cases wherein the person dealing with the agent had notice of the insanity of the principal, and the agent had no interest of his own, this doctrine is fully sustained by the decisions.¹ But the principal's insanity does not terminate an agency coupled with an interest.² Beyond which, there is conceded to be some indefinite ground; as, if the party dealing with the agent had contracted with him in a similar way when the principal was sane, and had no notice of the insanity, or if otherwise there were good faith and a benefit conferred,³ or if the mental derangement was slight, some courts or all will sustain the contract.⁴

§ 1056. **Other Methods.** — There are other methods of terminating an agency; as, performance by the agent,⁵ the conveying away, by the principal, of the thing to which the agency relates,⁶ the bankruptcy of the principal,⁷ the marriage of a *feme sole* principal,⁸ but not necessarily of a *feme sole* agent,⁹ the marriage of a single man where the agency is to sell land which constitutes his home,¹⁰ the dissolution of a company or partnership principal;¹¹ and there are other obvious ways.¹²

V. *The Express and Implied Powers of the Agent.*

§ 1057. **Source of Power — (Infancy — De Jure, De Facto).** — The powers of the agent cannot exceed those of his principal,¹³ and in all other respects his authorization must proceed from a competent source. Thus, in cases where an infant's

¹ *Drew v. Nunn*, 4 Q. B. D. 661; *Hill v. Day*, 7 Stew. Ch. 150; *Davis v. Lane*, 10 N. H. 156; *Story Agency*, § 481, 487.

² *Haggart v. Ranger*, 15 Fed. Rep. 860; *Hill v. Day*, supra.

³ Ante, § 969, 970.

⁴ *Hill v. Day*, supra; *Drew v. Nunn*, supra.

⁵ *Antoni v. Belknap*, 102 Mass. 193.

⁶ *Trumbull v. Nicholson*, 27 Ill. 149.

⁷ *Story Agency*, § 482.

⁸ *Wambole v. Foote*, 2 Dak. 1; *Drew v. Nunn*, 4 Q. B. D. 661, 665.

⁹ *Armstrong v. Kerns*, 61 Md. 364.

¹⁰ *Henderson v. Ford*, 46 Texas, 627.

¹¹ *Montross v. Roger Williams Ins. Co.* 49 Mich. 477; *Whitworth v. Ballard*, 56 Ind. 279; *Meyer v. Atkins*, 29 La. An. 586; *Vaccaro v. Toof*, 9 Heisk. 194.

¹² And see *Jones v. Commercial Bank*, 78 Ky. 413.

¹³ *Montreal Assurance Co. v. McGilivray*, 13 Moore P. C. 87; *Cook v. Lindsay*, 57 Texas, 67.

capacity does not extend to the appointment of an agent,¹ the acts of one whom he attempts to empower do not bind him.² Nor can one, under any circumstances, and by whatever means, create an agency in himself.³ But a mere officer *de facto* of a corporation, not entitled to the office *de jure*, may, while acting in the office, transmit a competent authority.⁴

§ 1058. **Express.** — When the instruction to the agent is in express words, not requiring interpretation,⁵ no question can arise as to his powers if within the principal's. Still the meaning must in every litigated case be judicially ascertained, — as to which, the rules laid down in a preceding chapter will ordinarily suffice.⁶ To illustrate, —

§ 1059. **Meanings.** — It being the legal rule that the principal can terminate the agency at pleasure,⁷ if a written power of attorney is silent as to its duration, the agent, whenever discharged, cannot recover damages for being turned off.⁸ And if such power recites that the principal is going abroad, and wishes an attorney to act for him during his absence, the agency ends with his return.⁹ An authorization to sign the principal's name "to any paper" is limited to paper within the principal's business, not extending to what is outside.¹⁰ A power to loan money does not include that of taking usurious interest.¹¹ One carrying on business in the name of an agent is liable for the agent's contracts made in such name.¹² One who orders a club supper, with an agreed bill of fare, is responsible only for what is within the bill; his guests, by calling for things outside, bind themselves, not him, to pay for them.¹³ A power of attorney is not separable into parts against its obvious meaning; as, if it authorizes the

¹ Ante, § 930.

² *Armitage v. Widoe*, 36 Mich. 124; *Saunderson v. Marr*, 1 H. Bl. 75.

³ *Stringham v. St. Nicholas Ins. Co.* 4 Abb. Ap. 315.

⁴ 1 Bishop Crim. Law, § 464; *Woodbury v. Knox*, 74 Maine, 462; *Abbott v. Chase*, 75 Maine, 83; *San Jose Sav. Bank v. Sierra Lumber Co.* 63 Cal. 179.

⁵ Ante, § 379.

⁶ Ante, § 365 et seq.

⁷ Ante, § 1050.

⁸ *Jacobs v. Warfield*, 23 La. An. 395.

⁹ *Danby v. Coutts*, 29 Ch. D. 500, 514.

¹⁰ *Camden Safe Deposit, &c. Co. v. Abbott*, 15 Vroom, 257. And see *Attwood v. Munnings*, 7 B. & C. 278.

¹¹ *Gokey v. Knapp*, 44 Iowa, 32.

¹² *Chandler v. Coe*, 54 N. H. 561.

¹³ *Eaton v. Gay*, 44 Mich. 431.

cancelling of a mortgage and the notes it secures, and the taking of a new mortgage and notes, the agent cannot do the former without the latter.¹ An authority, in general terms, to hire a clerk for the principal at eleven dollars a week does not empower the agent to fix the period of service at six months.² Two separate agents may be employed about the same business, if of a nature to admit of it; therefore a principal, by authorizing a second agent to negotiate bonds, does not by implication put an end to the power of the first agent.³

§ 1060. **Implied from Express.** — Whatever powers are strictly necessary to the carrying out of those expressly given to the agent, are his by implication.⁴ There is a similar rule governing the interpretation of statutes.⁵ The powers thus implied are, within principles explained in a preceding chapter,⁶ regarded the same in the law as though set down in words. To illustrate, —

§ 1061. **Instances.** — An agent to open a new channel, changing the course of a stream, may, to expedite the work, construct a dam across its former bed.⁷ One authorized to get immediate possession of a particular storeroom, may give his principal's promise to pay a bonus which the two understood would be required.⁸ And a committee to investigate the affairs and accounts of a corporation has, by implication, authority to employ an accountant, and obtain for him clerical assistance.⁹ So an agent to travel and sell steam engines,¹⁰ or a commercial traveller with samples,¹¹ may hire the teams necessary for transportation. On the other hand, a son em-

¹ *Foster v. Paine*, 56 Iowa, 622.

² *Pasco v. Smith*, 49 Conn. 576. An agency "at a salary of one thousand dollars per year, payable quarterly," is for at least one year. *Horn v. Western Land Assoc.* 22 Minn. 233.

³ *Hatch v. Coddington*, 95 U. S. 48.

⁴ *Star Line v. Van Vliet*, 43 Mich. 364; *Craighead v. Peterson*, 72 N. Y. 279; *Farrar v. Duncan*, 29 La. An. 126; *Shackman v. Little*, 87 Ind. 181; *Hardee v. Hall*, 12 Bush, 327; *The Pontida*, 9 P. D. 177, 180; *Benninghoff v. Agricul-*

tural Ins. Co. 93 N. Y. 495, 505; *Boyd v. Satterwhite*, 10 S. C. 45; *Howard v. Baillie*, 2 H. Bl. 618; *Collen v. Gardner*, 21 Beav. 540.

⁵ *Bishop Written Laws*, § 137.

⁶ *Ante*, § 239 et seq.

⁷ *Barns v. Hannibal*, 71 Misso. 449.

⁸ *Shackman v. Little*, 87 Ind. 181.

⁹ *Star Line v. Van Vliet*, 43 Mich. 364.

¹⁰ *Huntley v. Mathias*, 90 N. C. 101.

¹¹ *Bentley v. Doggett*, 51 Wis. 224.

ployed to keep his father's books of account, and compute the interest due on notes, cannot by virtue thereof accept a quantity of corn in satisfaction of a note.¹ One who may secure a claim by note, bill of sale, mortgage, "or any way to settle the above bill," cannot, therefore, to accomplish the object, purchase the debtor's property, creating a debt against his employer.² One authorized to collect interest is not, by implication therefrom, permitted to receive the principal.³ An agency to collect a debt does not include the power to release it;⁴ to solicit passengers for a railroad, does not comprehend also a bargaining for freight;⁵ to carry out an existing contract, does not authorize the making of a change in it.⁶ And the agent's mere possession of a promissory note, not indorsed, does not qualify him to receive payment.⁷ Again, —

§ 1062. **Authority to Sell.** — The authority to sell a chattel does not arise from its mere possession.⁸ Yet circumstances in connection with the possession may imply it.⁹ An express authorization to deal with a thing is not extended by interpretation beyond its terms and what is fairly necessary to give them effect. Thus, one having a note for collection,¹⁰ or requested to get an offer for a diamond put into his hands,¹¹ cannot, therefore, sell it. And one has no power to sell a business which he is general agent to manage.¹² A person authorized to sell real estate and receive the purchase money may execute the proper instruments of conveyance;

¹ *Reynolds v. Ferree*, 86 Ill. 570.

² *Pollock v. Cohen*, 32 Ohio State, 514.

³ *Smith v. Kidd*, 68 N. Y. 130, 137; *Williams v. Walker*, 2 Sandf. Ch. 325.

⁴ *Herring v. Hottendorf*, 74 N. C. 588.

⁵ *Taylor v. Chicago, &c. Railway*, 74 Ill. 86.

⁶ *Gerrish v. Maher*, 70 Ill. 470; *Rhine v. Blake*, 59 Texas, 240; *McHany v. Schenk*, 88 Ill. 357. And see *Richmond Street Railroad v. Reed*, 83 Ind. 9.

⁷ *Doubleday v. Kress*, 50 N. Y. 410.

⁸ *Covill v. Hill*, 4 Denio, 323; *Wilson v. Nason*, 4 Bosw. 155; *Case v. Jennings*, 17 Texas, 661; *Moore v. Robinson*, 62 Ala. 537; *Cummins v. Beaumont*, 68 Ala. 204.

⁹ *Dyer v. Pearson*, 3 B. & C. 38, 4 D. & R. 648; *Pickering v. Busk*, 15 East, 38.

¹⁰ *Smith v. Johnson*, 71 Misso. 382.

¹¹ *Levi v. Booth*, 58 Md. 305. An agent to find a purchaser may describe the property, so as to bind the purchaser by the description. *Mullens v. Miller*, 22 Ch. D. 194.

¹² *Holbrook v. Oberne*, 56 Iowa, 324.

for, without them, a sale cannot be made complete, and the money received.¹ And a power to sell anything, while it must be construed according to its nature and terms, carries with it, in a general way, authority to execute the usual and proper writings,²—not always or necessarily, in the case of real estate, extending to the deed.³ One who may “sell” a thing is ordinarily entitled to take payment;⁴ but he cannot, therefore, barter or exchange it for what is not money,⁵ or in discharge of his own debt, or give credit.⁶ Nor, where the sale is, by permission, on credit, can he collect the payment.⁷ Nor, after a sale is made, can he rescind it or materially alter its conditions.⁸ These conclusions may be varied by special terms in the agent’s authorization,⁹ or by custom.¹⁰ To illustrate, —

§ 1063. **Collateral to Sale—(Warranty).**—One empowered to sell may bind his principal by any collateral stipulations which are customary in the particular business.¹¹ For example, he may warrant the article to the extent sanctioned by custom,¹² but to no degree where it is the custom to sell without warranty.¹³ For cases not within any custom, the authorities are conflicting, perhaps the greater number denying the power to warrant.¹⁴ But commonly some special cir-

¹ *Valentine v. Piper*, 22 Pick. 85; *Hemstreet v. Burdick*, 90 Ill. 444; 91; *Taylor v. Starkey*, 59 N. H. 142.

² *Burks v. Hubbard*, 69 Ala. 379; *Wheeler, &c. Manuf. Co. v. Givan*, 65 Misso. 89.

³ *Clark v. Smith*, 88 Ill. 298; *Janney v. Boyd*, 30 Minn. 319; *Draper v. Rice*, 56 Iowa, 114. See *Harris v. Simmerman*, 81 Ill. 413.

⁴ *Adrian v. Lane*, 13 S. C. 183.

⁵ *Smart v. Sandars*, 3 C. B. 380, 10 Jur. 841; *Hall v. Storrs*, 7 Wis. 253.

⁶ *Ante*, § 444–459; *Dickinson v. Lilwall*, 4 Camp. 279, 1 Stark. 128.

⁷ *Herring v. Skaggs*, 62 Ala. 180; *Dingle v. Hare*, 7 C. B. N. s. 145, 6 Jur. N. s. 679.

⁸ *Collins v. Newton*, 7 Baxter, 269; *Higgins v. Moore*, 6 Bosw. 344; *Hatch v. Taylor*, 10 N. H. 538; *Cross v. Haskins*, 13 Vt. 536.

⁹ *Hampton v. Moorhead*, 62 Iowa, and the cases there cited; *Perrine v.*

cumstance, or the nature of the transaction, or of the thing sold, will, and it is believed should, in the absence of custom, decide the question. Thus, the power to sell a manufactured article carries with it the power to warrant the quality.¹ And an agent to vend harvesters (which, like manufactured articles, are for an ascertained and specific purpose) is presumptively authorized to add, to the sale of one, a proper warranty,² or the condition that it works well.³ But a safe has uses besides protection against burglars, and an authority to sell it does not include the power to warrant it burglar proof.⁴

§ 1064. **Purchaser.** — An agent to purchase goods has the implied authority to direct as to their delivery.⁵ And one to buy a town site and lay out a town may bind his principal by the dedication of land therein to the public use.⁶ The agency necessarily includes these powers. But a person directed to purchase goods with money put into his hands by the principal, cannot buy on the latter's credit;⁷ nor, if he does, is the principal bound though he receives and uses the goods, unless he knows that they are not paid for.⁸ Where the principal does not provide the agent with the money, the latter may pledge the former's credit; for otherwise he cannot execute the agency.⁹ Again, —

§ 1065. **Arbitration.** — An agent to settle claims against his

Cooley, 13 Vroom, 623, in the lower court Cooley v. Perrine, 12 Vroom, 322; Smith v. Tracy, supra; McCormick v. Kelly, 28 Minn. 135; Gaul v. Strutzel, 53 Iowa, 712; Herring v. Skaggs, 73 Ala. 446.

¹ Boothby v. Scales, 27 Wis. 626.

² McCormick v. Kelly, 28 Minn. 135; Murray v. Brooks, 41 Iowa, 45.

³ Deering v. Thom, 29 Minn. 120.

⁴ Herring v. Skaggs, 73 Ala. 446.

Of the Cases. — It is necessary occasionally to remind the young and inexperienced reader, though it would be useless to the veteran, that judges in their opinions do not always employ the reasonings (ante, § 12-15) which the legal author is required to present. One

of the leading objects of a text book in the law is to unfold, from a higher standpoint than it is possible a judge should occupy, the reasons which, not always occurring to the judicial mind, really underlie the adjudications. This case and those in the last note, if illustrative of this fact, are not more so than many others.

⁵ Owen v. Brockschmidt, 54 Misso. 285.

⁶ Barteau v. West, 23 Wis. 416.

⁷ Post, § 1098.

⁸ Komorowski v. Krumdick, 56 Wis. 23. See Adams v. Boies, 24 Iowa, 96; Fraser v. McPherson, 3 Des. 393.

⁹ Sprague v. Gillett, 9 Met. 91. See Berry v. Barnes, 23 Ark. 411.

principal is not therefore authorized to submit them to arbitration.¹ And one instructed to make a submission to a particular arbitrator cannot, on his declining to act, substitute another.²

§ 1066. **Nature of Agency.**—The nature of the agency goes far to determine the agent's powers. For example, whatever be the authority of a railroad president³ or superintendent⁴ to employ attendance, at its expense, on one of its servants injured by its cars, the power is not as of course with a station agent or conductor.⁵ Again,—

§ 1067. **Subagent.**—In the absence of any controlling stipulation, the agent may, or not, delegate a part or all of his functions to a subagent, according to the nature and circumstances of the agency. As to which the leading distinction is, that an agency to be exercised through a discretion in the agent is a personal trust, and it cannot be transmitted to another,⁶ but a power simply ministerial may be.⁷ And where the agency requires acts both discretionary and ministerial, the latter may be performed through a subagent or clerk, but not the former.⁸ Thus, a payment made to the agent's clerk is a payment to the agent.⁹ The agent's signature, by his clerk, is good to papers which in ordinary business are executed in this way.¹⁰ And an agent to sell real estate, having in person fixed the price and done whatever else is discretionary, can do the rest by subagent.¹¹ But the main functions

¹ *Michigan Central Railroad v. Iowa*, 532; *Bocock v. Pavey*, 8 Ohio State Gougar, 55 Ill. 503.

² *Cox v. Fay*, 54 Vt. 446.

³ *Canney v. South Pacific Coast Railroad*, 63 Cal. 501.

⁴ *Marquette, &c. Railroad v. Taft*, 28 Mich. 289.

⁵ *Tucker v. St. Louis, &c. Railway*, 54 Misso. 177; *Cairo, &c. Railroad v. Mahoney*, 82 Ill. 73.

⁶ *Grady v. American Cent. Ins. Co.* 60 Misso. 116; *Brewster v. Hobart*, 15 Pick. 302; *Emerson v. Providence Hat Manuf. Co.* 12 Mass. 237; *Paul v. Edwards*, 1 Misso. 30; *Hunt v. Douglass*, 22 Vt. 128; *Warner v. Martin*, 11 How. U. S. 209, 224; *Loomis v. Simpson*, 13

Iowa, 532; *Bocock v. Pavey*, 8 Ohio State 270; *Yates v. Freckleton*, 2 Doug. 623.

⁷ *Grady v. American Cent. Ins. Co.* supra; *Ex parte Sutton*, 2 Cox, 84; *Commercial Bank v. Norton*, 1 Hill, N. Y. 501; *Grinnell v. Buchanan*, 1 Daly, 538; *Eldridge v. Holway*, 18 Ill. 445.

⁸ *Renwick v. Bancroft*, 56 Iowa, 527; *Rossiter v. Trafalgar Life Assur. Assoc.* 27 Beav. 377; *Johnson v. Osenton*, Law Rep. 4 Ex. 107, 112.

⁹ *Ulrich v. McCormick*, 66 Ind. 243
¹⁰ *Newell v. Smith*, 49 Vt. 255; *Ex parte Sutton*, 2 Cox, 84, 85; *Lord v. Hall*, 2 Car. & K. 698; *Norwich University v. Denny*, 47 Vt. 13.

¹¹ *Renwick v. Bancroft*, supra.

of a sheriff's keeper of attached goods,¹ of one's broker,² of an agent to bind one by promissory notes,³ of the bailee of one's property with power to sell,⁴ *a fortiori* of a notary,⁵ and multitudes of others within like reasons, are personal, not to be delegated. Where, from the nature of the business, the employment of subagents is necessary, and so presumably contemplated, their appointment is authorized;⁶ in which sort of case, the subagent is ordinarily deemed the principal's agent, for whom the chief agent is not responsible.⁷ But in the common case there is no privity between the principal and subagent, and for the doings of the latter the agent is answerable to the former the same as for his own.⁸

§ 1068. **As to Third Persons — (Unauthorized).** — Under many circumstances, persons dealing with the agent are entitled to assume that he has powers which in fact he has not, and thus bind the principal where, in truth, there was no authority. But this sort of authorization is for a subsequent sub-title.⁹

VI. *The Manner and Forms of the Contract by Agent.*

§ 1069. **Distinctions.** — The effect of contracts by agents and the manner of executing them differ in some degree with the sort of contract and its subject. We shall consider, First, Specialties; Secondly, Simple Contracts both Written and Oral.

§ 1070. **First. Specialties: —**

Form of Writing. — Recurring to explanations already given,¹⁰

¹ Connor v. Parker, 114 Mass. 331.

² Henderson v. Barnewall, 1 Y. & J. 387.

³ Brewster v. Hobart, 15 Pick. 302; Emerson v. Providence Hat Manuf. Co. 12 Mass. 237.

⁴ Hunt v. Douglass, 22 Vt. 128.

⁵ Commercial Bank v. Varnum, 3 Lans. 86, 104.

⁶ Krumm v. Jefferson Fire Ins. Co. 40 Ohio State, 225; Planters, &c. Nat. Bank v. First Nat. Bank, 75 N. C. 534; Dorchester, &c. Bank v. New England Bank, 1 Cush. 177.

⁷ *Ib.*; Campbell v. Reeves, 3 Head, 226; Louisville, &c. Railroad v. Blair, 4 Baxter, 407; Saveland v. Green, 40 Wis. 431.

⁸ Schmalzing v. Thomlinson, 6 Taunt. 147; Cobb v. Becke, 6 Q. B. 930; Louisville, &c. Railroad v. Blair, *supra*; Stephens v. Badcock, 3 B. & Ad. 354; Commercial Bank v. Jones, 18 Texas, 811; New Zealand, &c. Land Co. v. Watson, 7 Q. B. D. 374.

⁹ Post, § 1091 et seq.

¹⁰ Ante, § 426, 427, 885, 994.

in the States where, as apparently in most of them, the old rules for the interpretation of specialties prevail, the sealed contract by agent must, to hold the principal, be expressed with a precision not indispensable in simple promises. If, on its face, the words of covenant, grant, or the like are the agent's, and the seal purports to be his, it will bind him personally, though he describes himself therein as agent, and adds the word "agent" to his signature; and it will not bind the principal. To have the latter effect, the covenants must be in terms the principal's, and the seal must purport to be his; and then the agent will be free.¹ The decisions in our States differ so much as to render it impossible to say how far in any of them this rule may be departed from and leave the covenants the principal's. An apparent relaxation in one or more of the States is, that, wherever the intention is manifest on the whole instrument to bind the principal rather than the agent, it will be deemed the former's deed though signed by the latter in his own name.² Not inconsistently herewith we have, from other States, a refusal to apply to specialties the rule familiar in simple contracts,³ that an undisclosed principal may appear in court as party to an agreement made by an agent in his own name in the former's behalf; so that the covenants are simply and only the agent's.⁴ The formal words of attestation are construed in connection with those in the body of the instrument, sometimes changing what otherwise would be its effect.

§ 1071. **Form of Execution.** — The execution should be in

¹ *Berkeley v. Hardy*, 8 D. & R. 102, 5 B. & C. 355; *Appleton v. Binks*, 5 East, 148; *Carter v. Chaudron*, 21 Ala. 72; *Echols v. Cheney*, 28 Cal. 157; *Morrison v. Bowman*, 29 Cal. 337; *Bogart v. De Bussy*, 6 Johns. 94; *Locke v. Alexander*, 1 Hawks, 412; *The State v. Jennings*, 5 Eng. 428; *Parmer v. Respass*, 5 T. B. Monr. 562; *Pryor v. Coulter*, 1 Bailey, 517; *Barger v. Miller*, 4 Wash. C. C. 280; *Redmond v. Coffin*, 2 Dev. Eq. 437; *Grubbs v. Wiley*, 9 Sm. & M. 29; *Martin v. Flowers*, 8 Leigh, 158; *Love v. Sierra Nevada Lake Water*,

&c. Co. 32 Cal. 639; *Huntington v. Knox*, 7 Cush. 371, 374. But see *Rogers v. Bracken*, 15 Texas, 564; *Rogers v. Frost*, 14 Texas, 267.

² *Purinton v. Security Life Ins. &c. Co.* 72 Maine, 22, following *Nobleboro v. Clark*, 68 Maine, 87. Compare with *Bryson v. Lucas*, 84 N. C. 680; *McClure v. Herring*, 70 Misso. 18. And see *Hypes v. Griffin*, 89 Ill. 134.

³ Post, § 1079.

⁴ *Briggs v. Partridge*, 64 N. Y. 357, 365; ante, § 426.

the principal's name, not the agent's.¹ "It is not material," says Metcalf, "by what form of words such execution is denoted; whether it be 'for A B, C D,' or 'A B by C D his attorney,' or 'C D attorney for A B.'"² And, in strict law, it is sufficient for the agent to affix the principal's name and seal, or probably the seal alone,³ without writing his own name,⁴ — a form which, in practice, ought to be avoided. And for practical reasons, not from legal necessity, the agent should write his name in full.

§ 1072. Secondly. *Simple Contracts both Oral and Written*: —

After Manner of Specialties — (Exceptions). — The safe and orderly way both of constructing and of executing a simple contract in writing, by the agent, is to adopt the forms approved in specialties, omitting what pertains to the seal. There are believed to be no exceptions to the rule that this will be safe and effectual. But if parties do not choose this way, their purpose will sometimes take effect through other steps. As written and oral simple contracts are of one grade, and differ only in their manner of proof,⁵ we shall in this subtitle consider them together. Many of them have an effect derived from —

§ 1073. **Commercial Usage.** — "The law of merchants is part of the law of the land."⁶ Much of it is of modern growth. In general, it regards the substance of a transaction rather than its formalities. Combining with principles about to be stated, not all of which are applicable to sealed instruments, it has, step by step, proceeded to the establishment of rules quite unlike those which govern them, for all contracts, whether oral or written, not under seal. Thus, —

§ 1074. **The Principles.** — 1. All acquisitions which an agent

¹ *White v. Cuyler*, 6 T. R. 176.

² Met. Con. 105, referring to Combes's Case, 9 Co. 75 a, 76; *Wilks v. Back*, 2 East, 142; *Elwell v. Shaw*, 16 Mass. 42, 1 Greenl. 339; *Fowler v. Shearer*, 7 Mass. 14; *Brinley v. Mann*, 2 Cush. 337; *Mussey v. Scott*, 7 Cush. 215; *Jones v. Carter*, 4 Hen. & Munf. 184; *Wilburn v. Larkin*, 3 Blackf. 55; *Hunter v. Mil-*

ler, 6 B. Monr. 612; *Eckhart v. Reidel*, 16 Texas, 62.

³ Ante, § 112.

⁴ *Devinney v. Reynolds*, 1 Watts & S. 328; *Berkey v. Judd*, 22 Minn. 287, 302.

⁵ Ante, § 26, 27, 153-159.

⁶ Lord Kenyon in *Harrison v. Jackson*, 7 T. R. 207, 210.

makes in his agency, beyond his compensation, belong to the principal.¹ Hence, —

2. Whenever the agent, acting in his agency, obtains a contract, though in his own name, such contract becomes, like any other acquisition, virtually the principal's.²

3. While, on the one hand, a principal may thus take the avails of a contract made by his agent, though in the agent's name; he must also, on the other hand, bear its burdens, being responsible for the agent's acts.³

4. A legal interest carries with it the right to maintain a suit at law for its vindication or enforcement.⁴

5. A written contract cannot be contradicted by oral evidence.⁵

From these propositions we derive the following results: —

§ 1075. **Who sue and be sued.** — If A and B are principals, and X is the agent of A, and Y the agent of B, — then, if X and Y, each acting in his agency, but not disclosing it to the other, make a contract, whether oral or written, each is holden to the other; for so each understood it, and such are its terms. But the law has vested in A the apparent interest of X, and in B the apparent interest of Y; therefore, also, A is holden to B, and B is holden to A; for such is the legal effect of the transaction. Still further, each principal may stand, if he chooses, or be placed, if the other chooses, in the shoes of his agent; so that A may sue either B or Y, and B may sue either A or X. Again, X, if his principal does not interfere, may sue either B or Y; and Y, if his principal does not object, may sue either A or X. Other deductions will appear further on; but we shall first proceed to some propositions established by the courts, within these deductions.

¹ Ante, § 740; *Lafferty v. Jelley*, 22 Ind. 471; *Denson v. Stewart*, 15 La. An. 456; *McMurry v. Mobley*, 39 Ark. 309.

² *Messier v. Amery*, 1 Yeates, 533; *Von Hurter v. Spengeman*, 2 C. E. Green, 185; *Audenried v. Betteley*, 8 Allen, 302; *Damon v. Osborn*, 1 Pick. 476, 481.

³ *East India Co. v. Hensley*, 1 Esp. 112; *Elwell v. Chamberlin*, 31 N. Y. 611.

⁴ *Heald v. Warren*, 22 Vt. 409; *Townsend v. Townsend*, 5 Harring. Del. 127. And see *Stoddard v. Mix*, 14 Conn. 12.

⁵ Ante, § 169.

§ 1076. **Agent holden when no apparent Principal.** — The agent of a principal who resides abroad,¹ and any agent who does not disclose his agency, or who mentions it in mere general terms but does not name his principal,² will, in the absence of any contrary showing, be bound as on his own personal contract. Or, —

§ 1077. **Agent contracting in Own Name holden.** — Commonly, and when nothing to the contrary appears,³ should the agent execute a written contract in his own name, he will be bound by its terms, if adequate, though he is known to be acting as agent; and the mere appending of the word "agent" to his signature will not save him.⁴ But, —

§ 1078. **Not Holden.** — If the instrument itself declares that those executing it are not to be responsible, — for example, if its words are "We as trustees but not individually

¹ *Elbinger Actien-Gesellschaft v. Claye*, Law Rep. 8 Q. B. 313; *Armstrong v. Stokes*, Law Rep. 7 Q. B. 598, 605. The foreign principal and not the domestic agent will be bound, where such appears to have been the intention. *Rogers v. March*, 33 Maine, 106; *Bray v. Kettell*, 1 Allen, 80. See, also, *Hutton v. Bulloch*, Law Rep. 8 Q. B. 331, 9 Q. B. 572.

² *Merrill v. Wilson*, 6 Ind. 426; *Wheeler v. Reed*, 36 Ill. 81; *Pierce v. Johnson*, 34 Conn. 274; *Mithoff v. Byrne*, 20 La. An. 363; *McClellan v. Parker*, 27 Misso. 162; *McComb v. Wright*, 4 Johns. Ch. 659; *Forney v. Shipp*, 4 Jones, N. C. 527; *Meyer v. Barker*, 6 Binn. 228; *Davenport v. Riley*, 2 McCord, 198; *Conyers v. Magrath*, 4 McCord, 392; *Bacon v. Sondley*, 3 Strob. 542; *Royce v. Allen*, 28 Vt. 234; *Baldwin v. Leonard*, 39 Vt. 260; *Button v. Winslow*, 53 Vt. 430; *Merrill v. Kenyon*, 48 Conn. 314; *Irvine v. Watson*, 5 Q. B. D. 102.

³ Post, § 1078, 1079, 1082.

⁴ *Higgins v. Senior*, 8 M. & W. 834; *Sayre v. Nichols*, 5 Cal. 487; *Hall v. Cockrell*, 28 Ala. 507; *Andrews v. Allen*, 4 Harring. Del. 452; *Bickford v. First National Bank*, 42 Ill. 238; *Dem-*

ing v. Bullitt, 1 Blackf. 241; *Wiley v. Shank*, 4 Blackf. 420; *Crum v. Boyd*, 9 Ind. 289; *Scott v. Messick*, 4 T. B. Monr. 535; *McBean v. Morrison*, 1 A. K. Mar. 545; *Nugent v. Hickey*, 2 La. An. 358; *Forster v. Fuller*, 6 Mass. 58; *Thacher v. Dinsmore*, 5 Mass. 299; *Sumner v. Williams*, 8 Mass. 162; *Whiting v. Dewey*, 15 Pick. 428; *Hastings v. Lovering*, 2 Pick. 214; *Stackpole v. Arnold*, 11 Mass. 27; *Mayhew v. Prince*, 11 Mass. 54; *Arfridson v. Ladd*, 12 Mass. 173; *Seaver v. Coburn*, 10 Cush. 324; *Bass v. Randall*, 1 Minn. 404; *Rollins v. Phelps*, 5 Minn. 463; *Bingham v. Stewart*, 13 Minn. 106; *Pratt v. Beaupre*, 13 Minn. 187; *Chouteau v. Paul*, 3 Misso. 260; *Sheldon v. Dunlap*, 1 Harrison, 245; *Stone v. Wood*, 7 Cow. 453; *Bank of Rochester v. Monteath*, 1 Denio, 402; *Cabre v. Sturges*, 1 Hilton, 160; *Blakeman v. Mackay*, 1 Hilton, 266; *Collins v. Buckeye Ins. Co.* 17 Ohio State, 215; *Fash v. Ross*, 2 Hill, S. C. 294; *Hodges v. Green*, 28 Vt. 358; *Allen v. Pegram*, 16 Iowa, 163; *Steele v. McElroy*, 1 Sneed, Tenn. 341; *McWilliams v. Willis*, 1 Wash. Va. 199; *Nixon v. Downey*, 49 Iowa, 166; *Tilden v. Barnard*, 43 Mich. 376; *Long v. Millar*, 4 C. P. D. 450.

promise," &c., and persons sign it adding "trustees" to their names,¹ — the law will not make them parties, whatever it decides as to the liability of the principal. Beyond this, not only will the agent not be holden where the instrument and its execution are such that he would not be were it under seal;² but likewise, where evidently on the entire face of it he was understood as acting merely for his principal,³ he incurs no personal responsibility, yet the principal will be bound as party.⁴

§ 1079. **Principal holden — (Agent also).** — If, in a particular case, the agent is liable, or if the principal is, it does not follow that the other is not; while yet, in various circumstances, the casting of the responsibility on the one will exempt the other. Where the agency and the personality of the principal are known when the contract is made, it will not bind both principal and agent, because then is the time for the other contracting party to elect between them.⁵ But if such party is not then aware that he is dealing with an agent, or if the agent declines to name the principal, he may, on learning the facts, hold, should he choose, the latter as the party.⁶ "For it is a general rule, that, whenever an express

¹ *Shoe and Leather National Bank v. Dix*, 123 Mass. 148; *Wake v. Harrop*, 6 H. & N. 768, 1 H. & C. 202, 7 Jur. n. s. 710.

² *Ante*, § 1070, 1071; *King v. Handy*, 2 Bradw. 212; *Weaver v. Carnall*, 35 Ark. 198.

³ *McCall v. Clayton*, Busbee, 422; *Smith v. Alexander*, 31 Misso. 193; *Detroit v. Jackson*, 1 Doug. Mich. 106; *Many v. Beekman Iron Co.* 9 Paige, 188; *Traynham v. Jackson*, 15 Texas, 170; *Eastern Railroad v. Benedict*, 5 Gray, 561; *Sayre v. Nichols*, 7 Cal. 535; *Seery v. Socks*, 29 Ill. 313; *Ogden v. Raymond*, 22 Conn. 379; *Baker v. Chambles*, 4 Greene, Iowa, 428; *Tuttle v. Ayres*, 2 Penning. 682; *Shotwell v. McKown*, 2 Southard, 828; *Rathbon v. Budlong*, 15 Johns. 1; *Meadows v. Smith*, 12 Ire. 18; *Powell v. Finch*, 5 Yerg. 446; *Hall v. Huntoon*, 17 Vt. 244; *Harkins v. Edwards*, 1 Iowa, 426;

Rogers v. March, 33 Maine, 106; *Bank of Cape Fear v. Wright*, 3 Jones, N. C. 376; *Abbott v. Cobb*, 17 Vt. 593; *McGee v. Larramore*, 50 Misso. 425, 427.

⁴ *Lyon v. Williams*, 5 Gray, 557; *Cook v. Gray*, 133 Mass. 106.

⁵ *Post*, § 1085; *Coxe v. Devine*, 5 Harring. Del. 375; *Paterson v. Ganda-sequi*, 15 East, 62; *Silver v. Jordan*, 136 Mass. 319.

⁶ *Thomson v. Davenport*, 9 B. & C. 78, 2 Smith, Lead. Cas. 212, and see Mr. Smith's note; *Raymond v. Crown and Eagle Mills*, 2 Mct. 319; *French v. Price*, 24 Pick. 13; *Violett v. Powell*, 10 B. Monr. 347; *Hubbert v. Borden*, 6 Whart. 79; *Higgins v. Senior*, 8 M. & W. 834; *Beckham v. Drake*, 9 M. & W. 79; *Briggs v. Partridge*, 64 N. Y. 357; *Jessup v. Steurer*, 75 N. Y. 613; *Youghieny Iron, &c. Co. v. Smith*, 16 Smith, Pa. 340.

contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made.”¹ On the other hand, —

§ 1080. **Principal sue on Agent's Contract.** — The principal can, if he chooses, maintain an action in his own name on a contract, either oral or written, which thus, he being unknown, his agent has personally in the agent's name made for him; and there is some reason, while also there is some authority, for saying that this is so even though he was known to the other contracting party at the making of the contract.² For example, an undisclosed principal may sue on a promissory note payable to the agent, subject to the equities arising from the transaction.³ Or if the agent of an undisclosed principal makes a lease not under seal of the latter's real estate, the principal may sue for the rent in his own name.⁴ But —

§ 1081. **Agent sue.** — The agent also, if the principal does not interfere, may in his own name sue on a contract which, by its terms, is his own. Yet not on one which, though made by him, runs in the name of his principal.⁵

§ 1082. **How bind Known Principal.** — The forms of contracting which will bind a known principal already in a measure appear. Those sufficing in a specialty⁶ are adequate in a simple contract. And the further rule is, that, whenever, on

¹ *Cothay v. Fennell*, 10 B. & C. 671, 672.

² *Brooks v. Minturn*, 1 Cal. 481; *Eastern Railroad v. Benedict*, 5 Gray, 561; *Machias Hotel v. Coyle*, 35 Maine, 405; *Barry v. Page*, 10 Gray, 398; *Ford v. Williams*, 21 How. U. S. 287; *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. U. S. 344, 381; *Ruiz v. Norton*, 4 Cal. 355; *Woodruff v. McGehee*, 30 Ga. 158; *Oelrichs v. Ford*, 21 Md. 489; *Ames v. St. Paul, &c. Railroad*, 12 Minn. 412; *Elkins v. Boston, &c. Railroad*, 19 N. H. 337; *Taintor v. Prendergast*, 3 Hill, N. Y. 72; *Van Lien v. Byrnes*, 1 Hilton, 133; *Erickson v. Compton*, 6 How. Pr. 471;

In re Merrick's Estate, 2 Ashm. 485; *Huntington v. Knox*, 7 Cush. 371; *Gilpin v. Howell*, 5 Barr, 41; *Baltimore Coal Tar, &c. Co. v. Fletcher*, 61 Md. 288.

³ *Nave v. Hadley*, 74 Ind. 155.

⁴ *Bryant v. Wells*, 56 N. H. 152.

⁵ *Colburn v. Phillips*, 13 Gray, 64; *Sharp v. Jones*, 18 Ind. 314; *Ackerman v. Cook*, 34 Missis. 262; *Crosby v. Watkins*, 12 Cal. 85; *Devers v. Becknell*, 1 Misso. 333; *Gunn v. Cantine*, 10 Johns. 387; *Brackney v. Shreve, Cox*, 33; *Coggburn v. Simpson*, 22 Misso. 351; *Doe v. Thompson*, 2 Fost. N. H. 217.

⁶ *Ante*, § 1070, 1071.

the whole writing, illumined by its surroundings,¹ the intent² is manifest to make the principal a party, no inaccuracy in the language³ will defeat this construction, but the court will hold him to be such;⁴ or, by the same rule, it will hold him not to be such.⁵ Express terms cannot be contradicted to show that the contract is between other parties than it purports to be.⁶ But, where its words are silent, there is no contradiction of them in the proof that one of the parties was agent for a third and was acting in the agency;⁷ and, where this fact appears in the writing, it is still more effective. The "rule" as to which is, that, to quote from a learned judge, "when a person contracts as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone, and not the agent, is responsible,"⁸ — a rule which evidently requires the qualifications appearing in the foregoing sections. The cases on this question are in a degree inharmonious; but, to illustrate, a note signed "J. A. Robson, agent for his wife," has been held to bind the wife.⁹ And the simple signature to a contract, "A, agent," by a husband known to be acting for his wife, was given the same interpretation.¹⁰ A memorandum running, "If the Marsh harvester don't work to his satisfaction, he, W. Thom, can return the machine to me, and I will return his notes for the same. A. M. Schnell, agent," was adjudged to be "open to proof that it was the intention to bind his principal and not himself."¹¹ And, —

§ 1083. **Cashier — Treasurer.** — By custom probably universal, if the cashier of a bank, or the treasurer of any other corporation dealing in commercial paper, indorses its bill or note "A, cashier," or "A, treasurer," the indorsement is not

¹ Ante, § 372-376.

² Ante, § 380-382.

³ Ante, § 383.

⁴ *Deering v. Thom*, 29 Minn. 120.

⁵ *Steamship Bulgarian Co. v. Merchants Desp. Transp. Co.* 135 Mass. 421.

⁶ *Bryan v. Brazil*, 52 Iowa, 350.

⁷ Post, § 1083, 1084; *Higgins v. Senior*, 8 M. & W. 834; *Deering v.*

Thom, supra; *Mechanics Bank v. Bank of Columbia*, 5 Wheat. 326.

⁸ *Miller, J.*, in *Bonyng v. Field*, 81 N. Y. 159, 160.

⁹ *Rawlings v. Robson*, 70 Ga. 595.

¹⁰ *Byington v. Simpson*, 134 Mass. 169.

¹¹ *Deering v. Thom*, 29 Minn. 120, 121. And see *Lacy v. Dubuque Lumber Co.* 43 Iowa, 510.

personally A's, but the corporation's; or, if a bill or note is made payable to A, with the title of his office thus added, it becomes the corporation's, not his own.¹ Even, within this doctrine, if A does not add the name of his office, its omission may be supplied by intrinsic or extrinsic evidence.²

§ 1084. **Express Words — (Parol Evidence).** — It should be constantly borne in mind, what perhaps already sufficiently appears, that express terms in a contract will govern the particular case to the exclusion of the foregoing general deductions. Nor can parol evidence control them. Still, as just stated,³ it is no contradiction of a contract which is silent as to the fact, to prove that a party is acting therein, not on his own behalf, but for another. This "does not deny," said Parke, B., "that it is binding on those whom, on the face of it, it purports to bind ;⁴ but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal."⁵ Yet where, in a charter-party, the agent declared himself to be the "owner" of the vessel, the court held that parol evidence was not admissible to prove this declaration false, and so let in the true owner, being the real principal, to be the party to a suit.⁶

§ 1085. **Election — (Not both).** — In those cases where either the principal or the agent may be made the party, both cannot be, but those in interest will choose between the two.⁷ The principal and agent are neither joint nor several contractors, nor is the one a surety for the other ; the agent is the party in fact, the principal is the party in law. Therefore, when, knowing all, the party entitled to elect has made his

¹ Nave v. Lebanon Bank, 87 Ind. 204 ; First Nat. Bank v. Hall, 44 N. Y. 395 ; Hypes v. Griffin, 89 Ill. 134 ; Hymer v. Ijams, 56 Md. 470 ; State Bank v. Fox, 3 Blatch. 431 ; Robb v. Ross County Bank, 41 Barb. 586 ; Bank of Genesee v. Patchin Bank, 3 Kernan, 309.

² Bank of Utica v. Magher, 18 Johns. 341 ; Mechanics Bank v. Bank of

Columbia, 5 Wheat. 326 ; Merchants Bank v. Central Bank, 1 Ga. 418.

³ Ante, § 1082.

⁴ That such evidence would not be accepted, see Hypes v. Griffin, 89 Ill. 134.

⁵ Higgins v. Senior, 8 M. & W. 834, 844.

⁶ Humble v. Hunter, 12 Q. B. 310, 316.

⁷ Ante, § 1079-1081.

choice, he is bound by it;¹ and he cannot proceed either jointly or severally against both, or, discontinuing proceedings against one, hold the other.² Still, —

§ 1086. **Custom of a Trade.** — “By the custom of the particular trade,” observes Pollock, “the agent may be treated as a contracting party, and personally bound, as well as his principal.”³

§ 1087. **Third Persons.** — The foregoing general doctrines yield when interfering with the legal or equitable rights of any persons. Though the principal sues or is sued in his own name, third persons, the agents, and the parties will have their just claims, whether legal or equitable, respected, — too numerous to be here particularized.⁴

§ 1088. **Joint Agency — (Severable).** — An agency conferred on two or more persons, whether in terms “joint” or not, is, in the absence of words or circumstances showing the contrary, a joint agency. And it can be exercised only by all combining, not by one or any number less than all.⁵ Even if one becomes disabled, or if he dies, no further act in the agency can be performed; therefore, where it is not coupled with an interest in the survivor,⁶ it is now terminated.⁷ But

¹ Ante, § 783, 784.

² Smith Con. 2d Eng. ed. 320 et seq., and cases there cited; namely, *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574; *Thomson v. Davenport*, 9 B. & C. 78. The facts of these cases do not cover all the ground of the propositions in the text, which I have purposely made as broad as the principle on which they rest.

³ Pollock Con. 431, referring to *Humfrey v. Dale*, 7 Ellis & B. 266; *Dale v. Humfrey*, Ellis, B. & E. 1004; *Fleet v. Murton*, Law Rep. 7 Q. B. 126, 129; and *Hutchinson v. Tatham*, Law Rep. 8 C. P. 482.

⁴ In *re Merrick's Estate*, 2 Ashm. 485; *Foster v. Smith*, 2 Coldw. 474; *Waring v. Favenck*, 1 Camp. 85; *Kymer v. Suwercropp*, 1 Camp. 109; *Thomson v. Davenport*, 9 B. & C. 78; *Smyth v. Anderson*, 7 C. B. 21, 39; *Violet v.*

Powell, 10 B. Monr. 347; *Burnham v. Holt*, 14 N. H. 367; *Kelley v. Munson*, 7 Mass. 319; *Kingman v. Pierce*, 17 Mass. 247; *Merrill v. Bank of Norfolk*, 19 Pick. 32; *Selkirk v. Cobb*, 13 Gray, 313; *Frazier v. Erie Bank*, 8 Watts & S. 18; *Hall v. Williams*, 27 Vt. 405.

⁵ *Copeland v. Mercantile Ins. Co.* 6 Pick. 198, 202, 203; *Wilder v. Ranney*, 95 N. Y. 7; *Brennan v. Willson*, 71 N. Y. 502, 507; *Green v. Miller*, 6 Johns. 39; *First Parish in Sutton v. Cole*, 3 Pick. 232, 244; *Kupfer v. South Parish*, 12 Mass. 185; *Rollins v. Phelps*, 5 Minn. 463; *Jewett v. Alton*, 7 N. H. 253; *Johnston v. Bingham*, 9 Watts & S. 56; *Low v. Perkins*, 10 Vt. 532.

⁶ Ante, § 1051-1054.

⁷ *Co. Lit.* 181 b; *Salisbury v. Brisbane*, 61 N. Y. 617.

an agency, unlike an interest in an estate, may be joint and several if it is the will of its creator to make it so;¹ and then the execution may be by one or by all, yet not by more than one and less than all.² Still, —

§ 1089. **Except.** — These rules will give way whenever, and as far as, the evident intent of the principal or the nature of the case indicates what is different. Thus where, by a power of attorney, one constituted fifteen persons named his “attorneys jointly and separately” to do such things as “they his said attorneys, or any of them, should jointly and separately think proper,” an execution by four was held to satisfy the special terms.³ So, if a will vests personalty (not land) in two executors, with directions to sell it, a sale by one will be good; “because one executor, or one trustee, may dispose of personal property to a *bona fide* purchaser without the consent of the other.”⁴ Or, since it is the course of business for partners to act by one of them, if an agency is given to two in their partnership name, its execution by one will be good.⁵ And if on two persons, by separate instruments, is conferred the same agency, either may perform alone.⁶ Again, “if the sheriff, upon a *capias* directed to him, make a warrant to four or three jointly or severally to arrest the defendant, two of them may arrest him; because it is for the execution of justice, which is *pro bono publico*.”⁷ And the doctrine is general, that an agency in the public interest may be carried out by the majority,⁸ or the majority of those acting at a lawful meeting.⁹

§ 1090. **Concerning the Authorities.** — On the subject of

¹ *Slingsby's Case*, 5 Co. 18 b.

² *Ante*, § 870; *Story Agency*, § 42, referring to Co. Lit. 181 b; Com. Dig. Attorney, C. 11; 2 Rol. Abr. Feoffment, p. 8, R. l. 40; Bac. Abr. Authority, C; *Guthrie v. Armstrong*, 5 B. & Ald. 628.

³ *Guthrie v. Armstrong*, *supra*.

⁴ *Wilder v. Ranney*, 95 N. Y. 7, 12, opinion by Earl, J.

⁵ *Gordon v. Buchanan*, 5 Yerg. 71. And see *Purinton v. Security Life Ins. &c. Co.* 72 Maine, 22.

⁶ *Cushman v. Glover*, 11 Ill. 600.

⁷ Co. Lit. 181 b.

⁸ *Story Agency*, § 42, note; *Johnson v. Smith*, 21 Conn. 627; *Rex v. Beeston*, 3 T. R. 592; *Worcester v. Railroad Commissioners*, 113 Mass. 161; *Reynolds v. New Salem*, 6 Met. 340; *Williams v. School District*, 21 Pick. 75; *Sprague v. Bailey*, 19 Pick. 436; *Green v. Miller*, 6 Johns. 39, 41.

⁹ *Damon v. Granby*, 2 Pick. 345.

this sub-title, there is some difference between the earlier and later decisions ; and, even among the later, some real or apparent conflict. While, therefore, the foregoing doctrines are all well established, at least in the modern law, there may be found *dicta*, and perhaps adjudications, contrary to some of them, or qualifying them. Possibly slight qualifications, at one or two points, may properly be admissible ; yet none of much importance. A minuter delineation would not accord with the plan of this work

VII. *Unauthorized Contracts and their Ratification.*

§ 1091. **Authorization in Fact — By Estoppel.** — The agent's authorization in fact is the sort chiefly spoken of thus far in this chapter. There is another form, equally effective and even more common ; namely, by estoppel,—a doctrine¹ widely applicable in the law of agency. By reason whereof one who, in respect of another, so conducts himself or his business that third persons are entitled to deem the other his agent, with powers extending to a matter in question, is, as to third persons dealing with the supposed agent, estopped to deny the agency ; in other words, is bound by his seemingly authorized act, the same as though the authority were real.² The distinction between these two authorizations is, in the books, indicated in a general way, but not with absolute precision, by dividing agencies into —

§ 1092. **General and Special.** — It is not easy to draw, by a definition, the exact line distinguishing general and special agents. Practically a special agent may be defined as one appointed for a specific purpose, or to do a single act or series of acts, with no powers open to implication ; and a general agent, as one appointed, or by the principal held out, to conduct all his business, or a particular business, or to act generally for him in a particular matter.³

¹ Ante, § 264 et seq.

² Ante, § 288.

³ This statement of the distinction may be open to some criticism ; but, on

the whole, I do not see that it can be improved. Story's defining is a little different ; namely, "A special agency properly exists, when there is a delega-

§ 1093. **Order of Discussion.** — We shall consider, First, The Special Agent; Secondly, The General Agent; Thirdly, The Ratification of Unauthorized Acts of Agency.

§ 1094. First. *The Special Agent*.:—

Adhere to Authority. — The special agent binds his principal only when, or as far as, he pursues exactly the authority conferred;¹ “although,” adds Story, “a circumstantial variance in its execution will not defeat it.”² For example, a power to sell, at once, for a specified sum, cannot be executed after the lapse of a month;³ to sell “for ready money,” is not satisfied by a sale on credit;⁴ for a fixed price, will not make good a sale at a different price.⁵ One, therefore, dealing with a special agent, should inquire into his authorization; because any contract with him, not covered by it, is invalid.⁶

§ 1095. **Exceeding Authority.** — The agent’s doing more than he is authorized will not vitiate what is properly done, if the two are separable; otherwise, it will.⁷ Thus,—

§ 1096. **Seal or not.** — Within explanations already given,⁸

tion of authority to do a single act; a general agency properly exists, where there is a delegation to do all acts connected with a particular trade, business, or employment.” Story Agency, § 17. Consult also *Matthews v. Sowle*, 12 Neb. 398; *Patterson v. Ackerson*, 2 Edw. 427; *Irions v. Cook*, 11 Ire. 203; *Loudon, &c. Soc. v. Hagerstown, &c. Bank*, 12 Casey, Pa. 498; *Andrews v. Kneeland*, 6 Cow. 354, 357, 358; *Odiorne v. Maxcy*, 13 Mass. 178, 181; *Williams v. Mitchell*, 17 Mass. 98, 100. Story refers to *Parker v. Kett*, 1 Salk. 95, 96; *Whitehead v. Tuckett*, 15 East, 400, 408; *Anderson v. Coonley*, 21 Wend. 279; *Tomlinson v. Collett*, 3 Blackf. 436; and *Walker v. Skipwith*, Meigs, 502.

¹ *Baxter v. Lamont*, 60 Ill. 237; *Towle v. Leavitt*, 3 Fost. N. H. 360; *Batty v. Carswell*, 2 Johns. 48; *Allen v. Ogden*, 1 Wash. C. C. 174; *Nixon v. Hyserott*, 5 Johns. 58; *Angel v. Pownal*, 3 Vt. 461, 463; *McConnell v. Bowdry*, 4 T. B. Monr. 392; *Rawson v. Curtiss*, 19 Ill. 456; *Hayden v. Middlesex Turnpike*, 10 Mass. 397, 403; *Ad-*

ams v. Bourne, 9 Gray, 100; *Howard v. Braithwaite*, 1 Ves. & B. 202; *Cal-land v. Loyd*, 6 M. & W. 26; *Underwood v. Nicholls*, 17 C. B. 239; *Andrews v. Kneeland*, 6 Cow. 354, 357.

² Story Agency, § 165; *Boykin v. McLaughlin*, 35 Ala. 286; *Hemingway v. Stansell*, 106 U. S. 399.

³ *Matthews v. Sowle*, 12 Neb. 398.

⁴ *Cox v. Palmer*, 60 Missis. 793.

⁵ *National Iron Armor Co. v. Bruner*, 4 C. E. Green, 331; *Anonymous*, cited 15 East, 407. And see *Adams v. Flanagan*, 36 Vt. 400; *Hopkins v. Blane*, 1 Call, 361; *Blane v. Proudfit*, 3 Call, 207; *Whitehead v. Tuckett*, 15 East, 400.

⁶ *Silliman v. Fredericksburg, &c. Railroad*, 27 Grat. 119; *Wooding v. Bradley*, 76 Va. 614; *Strawn v. O’Hara*, 86 Ill. 53; *Campbell v. Sherman*, 49 Mich. 534.

⁷ Story Agency, § 166; *Drumright v. Philpot*, 16 Ga. 424; *Crozier v. Carr*, 11 Texas, 376; *Moore v. Thompson*, 32 Maine, 497; *Jesup v. City Bank*, 14 Wis. 331.

⁸ Ante, § 1045, 1046.

an unsealed authority will not qualify the agent to execute a sealed instrument; but, if he does it, the seal only, which is separable from the rest, is void, and the writing will take effect as a simple contract.¹ Again, —

§ 1097. **Authorized Sale and Unauthorized Covenants.** — If an agent makes an authorized sale, but adds unauthorized covenants, the former will bind the principal, the latter not. Still, as the purchaser can be compelled only to what he agreed, he has his election either, if the principal will not ratify the covenants, to affirm the sale without them or to reject the whole.² On the other hand, —

§ 1098. **Unauthorized Credit.** — A purchase of goods and an actual or agreed payment for them are inseparable; so that, as explained in another connection,³ if a special agent to buy them is provided with the money, but, contrary to instructions, he pledges his principal's credit for them, the latter is to no extent bound.⁴

§ 1099. Secondly. *The General Agent*: —

Unauthorized. — In cases not within the doctrine of estoppel,⁵ a general agent can no more than a special one bind his principal by acts not covered by his authorization.⁶ But, —

§ 1100. **Holding out.** — Within the rule of estoppel,⁷ if one, by words or by conduct, holds out to the public, or to an individual who acts upon the representation, that a person indicated is his agent, either generally or as to a particular transaction, and any party in the one case, or the special in-

¹ *Morrow v. Higgins*, 29 Ala. 448; *Baum v. Dubois*, 7 Wright, Pa. 260, 265; *Long v. Hartwell*, 5 Vroom, 116; *Dutton v. Warschauer*, 21 Cal. 609; *Worrall v. Munn*, 1 Selden, 229; *Wood v. Auburn, &c. Railroad*, 4 Selden, 160; *Thomas v. Joslin*, 30 Minn. 388; *The State v. Spartanburg, &c. Railroad*, 8 S. C. 129.

² *Vanada v. Hopkins*, 1 J. J. Mar. 285; *Smith v. Tracy*, 36 N. Y. 79. And see *Brady v. Todd*, 9 C. B. N. S. 592.

³ Ante, § 1064.

⁴ *Boston Iron Co. v. Hale*, 8 N. H. 363; *Jaques v. Todd*, 3 Wend. 83; *Pat-*

ton v. Brittain, 10 Ire. 8. And see *Landsdale v. Shackleford*, Walk. Missis. 149; *Tate v. Evans*, 7 Misso. 419; *White v. Cooper*, 3 Barr, 130.

⁵ Ante, § 1091.

⁶ Ante, § 1057 et seq.; *Petrie v. Pennsylvania Railroad*, 13 Vroom, 449; *Asher v. Sutton*, 31 Kan. 286; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404, 407; *Reed v. Ashburnham Railroad*, 120 Mass. 43; *Lewis v. Shreveport*, 108 U. S. 282; *Abrahams v. Weiller*, 87 Ill. 179.

⁷ Ante, § 1091.

dividual in the other, deals in good faith with such apparent agent, within the apparent authorization, he is bound; though, in fact, there was no authority, or the authority did not extend to the doing of what was done.¹ Thus, —

§ 1101. **In Counting-room.** — A payment of money to one in a merchant's counting-room, ostensibly intrusted with the business therein, yet not so in fact, is a payment to the merchant;² for he had placed the apparent agent in a position to mislead the other to his injury if the agency were not real,³ therefore he ought to be responsible for what in the ordinary course of business followed.⁴ Again, —

§ 1102. **Intrusting with Business.** — One who intrusts another with his business⁵ — for example, places him in general charge of his retail store,⁶ or in general superintendence of his foundry⁷ — is responsible for whatever he does in such business, according to its usual course; though, as between principal and agent, the latter exceeded his authority, or defrauded the former. And a foreign corporation is, as to strangers not having notice of its rules, estopped to deny the power of an agent to make a contract within its apparent functions, yet contrary to the rules.⁸ In like manner, an insurance company must bear the consequences of its agent's mistake, in wrongly stating facts correctly given him by the insured.⁹ In these cases, it is important to inquire what are the —

§ 1103. **Usages of the Particular Business.** — Where the usages of a business are publicly known, the agent is presumed to have the full powers commonly exercised by an

¹ *Lewis v. Bourbon*, 12 Kan. 186; *Dodge v. McDonnell*, 14 Wis. 553; *Booth v. Wiley*, 102 Ill. 84; *Airey v. Okolona Sav. Inst.* 33 La. An. 1346; *Nicholson v. Moog*, 65 Ala. 471; *American Merchants Exp. Co. v. Milk*, 73 Ill. 224; *Kingsley v. Fitts*, 51 Vt. 414; *Kelton v. Leonard*, 54 Vt. 230. See *Ish v. Crane*, 8 Ohio State, 520.

² *Barrett v. Deere, Moody & M.* 200. And see *Leslie v. Knickerbocker Life Ins. Co.* 63 N. Y. 27, 34.

³ Ante, § 284 et seq.

⁴ *De Baun v. Atchison*, 14 Misso. 543; *Dunham v. Jackson*, 6 Wend. 22; *Linsley v. Lovely*, 26 Vt. 123.

⁵ *Swire v. Francis*, 3 Ap. Cas. 106; *Phillip v. Aurora Lodge*, 87 Ind. 505.

⁶ *White v. Leighton*, 15 Neb. 424.

⁷ *Hoskins v. Swain*, 61 Cal. 338.

⁸ *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67.

⁹ *Farmers Ins. Co. v. Williams*, 39 Ohio State, 584.

agent therein; so that, though he has not, third persons, without notice, are protected in dealing with him as though he had.¹ But what is done beyond the usage, and not within the authority in fact, does not bind the principal.² And —

§ 1104. **Former Dealings through the Agent.** — A course of dealing by the particular agent, sanctioned by the principal, — as, for example, in paying bills without denying the authority, — will enable this agent to charge his principal in other similar cases, even though, in truth, the authority never existed, or has been withdrawn.³ Yet this doctrine will not protect one who, while bargaining with the agent, knows the facts.⁴ As to —

§ 1105. **Withdrawal and Notice.** — Where the principal withdraws from the agent an authority, whether it existed in fact or by implication, he must give due notice that it has ceased; or he will be holden to any innocent third person who deals with the former agent, believing the agency to continue.⁵ Anything adequate to put one on inquiry is notice;⁶ for, where the agent is not authorized in fact, a third person, to maintain a claim against the supposed principal, must himself have conducted in good faith.⁷

§ 1106. **Thirdly. The Ratification of Unauthorized Acts of Agency:** —

Voidable — Void — Ratification. — Where, as in the ordinary case, one in good faith contracts with a person whom he supposes to be an agent while he is not, or with a real agent

¹ *Minor v. Mechanics Bank*, 1 Pet. 46, 70; *Pickering v. Busk*, 15 East, 38; *Whitehead v. Tuckett*, 15 East, 400; *Wright v. Solomon*, 19 Cal. 64; *Chouteaux v. Leech*, 6 Harris, Pa. 224; *York County Bank v. Stein*, 24 Md. 447; *Williams v. Getty*, 7 Casey, Pa. 461; *Mount Olivet Cemetery v. Shubert*, 2 Head, 116.

² *Pope v. Albion Bank*, 57 N. Y. 126. And see *Browning v. Owen*, 44 Ind. 11.

³ *Watts v. Devor*, 1 Grant, Pa. 267; *Farmers Mutual Ins. Co. v. Taylor*, 23 Smith, Pa. 342; *Davis v. Lane*, 10 N. H. 156; *Miller v. Moore*, 1 Cranch C. C. 471.

⁴ *Smith v. Stanger*, Peake Ad. Cas.

116; *Curtis v. Barrs*, Peake Ad. Cas. 119.

⁵ *Lamothe v. St. Louis Marine Railway and Dock Co.* 17 Misso. 204; *Hancock v. Byrne*, 5 Dana, 513; *Beard v. Kirk*, 11 N. H. 397; *Diversy v. Kellogg*, 44 Ill. 114; *Longworth v. Conwell*, 2 Blackf. 469; *Baltimore v. Eschbach*, 18 Md. 276; *Planters Bank v. Cameron*, 3 Sm. & M. 609; *Munn v. Commission Co.* 15 Johns. 44; *Trueman v. Loder*, 11 A. & E. 589.

⁶ *Williams v. Birbeck*, Hoffman, 359.

⁷ *Hodge v. Combs*, 1 Black, 192; *National Life Ins. Co. v. Minch*, 53 N. Y. 144.

beyond the scope of the agency, the agent¹ and he have their mutual liabilities if the assumed principal refuses to ratify the act. If he ratifies it, the contracting having been in the principal's name, the agent is relieved.² As between the principal and the contracting third person, therefore, the contract is voidable; because binding on such third person, and good or ill as to the principal at his election.³ In the few exceptional cases wherein it is not in the principal's power to ratify the contract,⁴ it is, not voidable, but void.⁵

§ 1107. **Elsewhere.** — The ratification of voidable contracts is fully explained in other connections.⁶ The sort now under consideration does not differ in principle from the rest, therefore the expositions here may be brief.

§ 1108. **Power of Ratification — Effect.** — Any person, capable of entering into a contract,⁷ in whose name another as agent has, unauthorized, made one for him,⁸ has the power to ratify it, rendering it good from the beginning, and in all other respects the same as though the authority had originally existed.⁹

§ 1109. **How.** — As in other cases of ratification, the principal must have knowledge of the facts;¹⁰ then, if he accepts the benefit of the contract,¹¹ or if he remains silent while he

¹ Post, § 1119, 1120.

² *Berger's Appeal*, 15 Norris, Pa. 443.

³ Ante, § 611, 617, 905, 924.

⁴ Ante, § 848.

⁵ *Armitage v. Widoe*, 36 Mich. 124.

⁶ Ante, § 286, 542, 614, 620, 679, 683, 844-849, 936-945, 974-976, 995; post, § 1114, 1222-1226.

⁷ Ante, § 1106.

⁸ The doctrine applies only to this class of contracts, not to those which do not purport to be the principal's. *Collins v. Suan*, 7 Rob. N. Y. 623; *Commercial Bank v. Jones*, 18 Texas, 811; *Hamlin v. Sears*, 82 N. Y. 327, 330, 331.

⁹ *Williams v. Butler*, 35 Ill. 544; *Indianapolis, &c. Railroad v. Morris*, 67 Ill. 295; *Pollock v. Cohen*, 32 Ohio State, 514; *Sentell v. Kennedy*, 29 La. An. 679; *Wilson v. Dame*, 58 N. H. 392.

¹⁰ *Roberts v. Rumley*, 58 Iowa, 301;

Mann v. Ætna Ins. Co. 40 Wis. 549; *Sheldon Hat Blocking Co. v. Eickemeyer Hat, &c. Co.* 90 N. Y. 607; *Pollock v. Cohen*, 32 Ohio State, 514; *Hovey v. Brown*, 59 N. H. 114.

¹¹ *Stecker v. Smith*, 46 Mich. 14; *Matteson v. Blackmer*, 46 Mich. 393; *Strasser v. Conklin*, 54 Wis. 102; *Johnson v. Bernheim*, 76 N. C. 139; *Miles v. Ogden*, 54 Wis. 573; *Glover v. Dowagiac Univ. Parish*, 48 Mich. 595; *Dunn v. Hartford, &c. Railroad*, 43 Conn. 434; *Vaughn v. Sheridan*, 50 Mich. 155; *Fowler v. New York Gold Exch. Bank*, 67 N. Y. 138; *Ruggles v. Washington*, 3 Misso. 496; *Hastings v. Bangor House*, 18 Maine, 436; *Low v. Connecticut, &c. Railroad*, 46 N. H. 284; *Reid v. Hibbard*, 6 Wis. 175; *Perry v. Mulligan*, 58 Ga. 479; *Fouch v. Wilson*, 59 Ind. 93; *Bolton v. Hillersden*, 1 Ld. Raym. 224.

ought to speak,¹ or if by any other act or by words he waives² the objection which he knows he might interpose,³ he affirms what was done by the assumed agent, and the contract becomes his. Having the choice of ratification or repudiation, he cannot recede from either when done.⁴

§ 1110. **All or None.** — The principal is not permitted to ratify a part of the agent's act, and repudiate the rest.⁵ But this neither permits a corporation to ratify its agent's *ultra vires* contracts, nor precludes it from affirming those within the corporate powers.⁶

VIII. *Frauds by and to Agents.*

§ 1111. **Authorized by Principal.** — The doctrine is universal in the law, that one who commits any wrong, civil or criminal, through the agency of another,⁷ incurs the same liability as if he did it by his own direct volition.⁸ Within which doctrine, a party who inspires his agent to procure for him a contract by fraud, sustains the same relation to it as if the fraud were his personal act.⁹ Again, —

§ 1112. **Unauthorized Fraud in Authorized Agency.** — The rule in civil jurisprudence is still broader; namely, that the principal is responsible for the agent's acts, though unauthorized, within the limits and in the execution of the agency,¹⁰

¹ Walker v. Walker, 7 Baxter, 260; Cairo, &c. Railroad v. Mahoney, 82 Ill. 73; Schenck v. Sautter, 73 Misso. 46; Meyer v. Morgan, 51 Missis. 21; Hawkins v. Lange, 22 Minn. 557; Law v. Cross, 1 Black, 533; Owsley v. Woolhopper, 14 Ga. 124; Brigham v. Peters, 1 Gray, 139; Lindsley v. Malone, 11 Harris, Pa. 24; Cairnes v. Bleecker, 12 Johns. 300.

² Ante, § 777-808.

³ Jones v. Atkinson, 68 Ala. 167; Bailey v. King, 41 Conn. 365; Warder v. Pattee, 57 Iowa, 515; Merrifield v. Parritt, 11 Cush. 590.

⁴ Andrews v. Aetna Life Ins. Co. 92 N. Y. 596, 604. Compare with Woodward v. Harlow, 28 Vt. 338; Reed v. Latham, 40 Conn. 452.

⁵ Eberts v. Selover, 44 Mich. 519; Tasker v. Kenton Ins. Co. 59 N. H. 438; Joslin v. Miller, 14 Neb. 91; Crawford v. Barkley, 18 Ala. 270; Hodnett v. Tatum, 9 Ga. 70; Crans v. Hunter, 28 N. Y. 389.

⁶ Bangor Boom Corp. v. Whiting, 29 Maine, 123.

⁷ Ante, § 1026.

⁸ United States v. Voss, 1 Cranch C. C. 101; 1 Bishop Crim. Law, § 631; Moir v. Hopkins, 16 Ill. 313; Exum v. Brister, 35 Missis. 391.

⁹ Lunday v. Thomas, 26 Ga. 537, 544; Lewis v. The State, 21 Ark. 209; Kelly v. Troy Fire Ins. Co. 3 Wis. 254.

¹⁰ Story Agency, § 452; Udell v. Atherton, 7 H. & N. 172, 7 Jur. n. s. 777; Fuller v. Wilson, 3 Q. B. 58, 67; Southwick v. Estes, 7 Cush. 385; Phelon v.

yet not beyond those limits.¹ So that, if the agent, in a particular contracting covered by his authorization, makes fraudulent representations, the other party may treat them as the principal's own, though he did not direct or expect them. Having employed the agent to do the thing, he must bear whatever comes from the manner of doing.² But, —

§ 1113. **Not in Line of Agency.** — For an independent fraud, by a special agent, not within the scope of his agency, the principal is not responsible.³ Still, —

§ 1114. **Ratified by Principal.** — If one, however innocently, accepts the benefit of a contract made in his behalf by another, or otherwise ratifies it, he then becomes responsible for any fraud which entered into its procurement, the same as though committed in person.⁴

§ 1115. **Fraud on Agent.** — A fraud practised on an agent is, in law, a fraud upon his principal.⁵

IX. *The Rights and Liabilities of Agents.*

§ 1116. **Elsewhere.** — In a preceding sub-title,⁶ we saw under what circumstances a suit may be maintained, or not,

Stiles, 43 Conn. 426. "With respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Willes, J. in *Barwick v. English Joint Stock Bank*, Law Rep. 2 Ex. 259, 265.

¹ *Kennedy v. Parke*, 2 C. E. Green, 415; *Clark v. Baker*, 2 Whart. 340; *Oxford v. Peter*, 28 Ill. 434.

² *Willis v. Martin*, 4 T. R. 39, 66; *Locke v. Stearns*, 1 Met. 560; *Jewett v. Carter*, 132 Mass. 335; *Robinson v. Walton*, 58 Misso. 380; *Durst v. Bur-*

ton, 47 N. Y. 167; *Jeffrey v. Bigelow*, 13 Wend. 518; *Smith v. Tracy*, 36 N. Y. 79; *Johnson v. Barber*, 5 Gilman, 425; *Henderson v. Railroad*, 17 Texas, 560; *Wright v. Calhoun*, 19 Texas, 412; *Morton v. Scull*, 23 Ark. 289; *Union Bank v. Campbell*, 4 Humph. 394; *Bennett v. Judson*, 21 N. Y. 238; *Murray v. Mann*, 2 Exch. 538, 540. See *Perley v. Catlin*, 31 Ill. 533; *Kennedy v. McKay*, 14 Vroom, 288.

³ *Kennedy v. Parke*, 2 C. E. Green, 415; *Fellows v. Oneida*, 36 Barb. 655; *Echols v. Dodd*, 20 Texas, 190; *Kelly v. Troy Fire Ins. Co.* 3 Wis. 254.

⁴ *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Elwell v. Chamberlin*, 31 N. Y. 611; *Smith v. Tracy*, 36 N. Y. 79; *Lane v. Black*, 21 W. Va. 617.

⁵ *May v. Magee*, 66 Ill. 112.

⁶ *Ante*, § 1069-1090.

between the agent and a third party who has contracted with him.

§ 1117. **Agent's Torts and Crimes.** — The command of a principal never justifies the commission of either a civil tort¹ or a criminal wrong;² therefore the agent incurs the same liability as though he did not act under another, but proceeded self-moved. Hence, —

§ 1118. **Agent's Fraud.** — Though, to the extent stated in the last sub-title, the principal is responsible for the fraud of his agent, the agent also is personally liable, the same as though he were acting for himself.³ But, —

§ 1119. **Contracts in Name of Principal** — (Whether Agent liable). — Except as stated in a preceding sub-title,⁴ and except as is about to appear, an agent is not personally responsible for a contract which, in good faith, he makes in the name of his principal whom he intends to bind.⁵ Even though he has no authority, if the other party is equally with himself cognizant of the facts, both being conclusively presumed to know the law,⁶ and if under the facts and law the principal in the particular instance is not holden, neither will be the agent, who has thus acted honestly.⁷ On this ground, a public agent, whose functions are defined by law,⁸ therefore presumably known by all, is not personally answerable though he fails to bind his principal by reason that he exceeds his

¹ *Bell v. Josselyn*, 3 Gray, 309; *Lee v. Mathews*, 10 Ala. 682; *Johnson v. Barber*, 5 Gilman, 425; *Richardson v. Kimball*, 28 Maine, 463; *Hardacre v. Stewart*, 5 Esp. 103; *Gaines v. Briggs*, 4 Eng. 46; *Etter v. Bailey*, 8 Barr, 442; *Bennett v. Ives*, 30 Conn. 329. Story states the doctrine thus: "The agent is personally liable to third persons for his own misfeasances and positive wrongs. But he is not, in general, for there are exceptions, liable to third persons for his own non-feasances or omissions of duty in the course of his employment. His liability, in these latter cases, is solely to his principal." *Story Agency*, § 308.

² 1 *Bishop Crim. Law*, § 355.

³ *Cullen v. Thomson*, 4 Macq. Ap. Cas. 424, 9 Jur. n. s. 85; *Swift v. Winterbotham*, Law Rep. 8 Q. B. 244; s. c. nom. *Swift v. Jewsbury*, Law Rep. 9 Q. B. 301.

⁴ Ante, § 1069-1090.

⁵ *Rathbon v. Budlong*, 15 Johns. 1; *Seery v. Socks*, 29 Ill. 313; *Ogden v. Raymond*, 22 Conn. 379; *Abbey v. Chase*, 6 Cush. 54; *Whitney v. Wyman*, 101 U. S. 392; *Alexander v. Sizer*, Law Rep. 4 Ex. 102.

⁶ Ante, § 461 et seq.

⁷ *Ware v. Morgan*, 67 Ala. 461; *Jefts v. York*, 10 Cush. 392, 395, 396; *Polhill v. Walter*, 3 B. & Ad. 114, 124.

⁸ Ante, § 993.

authority.¹ And, on the same ground, a wife, who in procuring domestic supplies was acting as agent of her husband abroad, was adjudged not responsible for those which were furnished her after he, unknown to either party, had died,² so that his estate was not holden.³ But, in cases where the agent and the person contracting with him are not on an equality as to their knowledge of the facts,—whereof the agent is actually or presumptively cognizant, while the other is not,—he who fails to charge his principal charges himself.⁴ There are differences of opinion as to the nature of the obligation so incurred. Thus,—

§ 1120. **How Agent liable.**—By the English doctrine, commonly followed in our courts, the agent, if in form the contract is the principal's, cannot be holden as promisor therein, though the contracting was unauthorized. If he was aware of his want of authority, his act was fraudulent in fact; if not aware, it was fraudulent in law; and, in either case, the law implies his warranty that he had authority, or makes him responsible as for a tort.⁵ Some of our American courts hold that, in these circumstances, the agent is directly answerable on the contract, as the party; “and the name of the person for whom he assumed to act will be rejected as surplusage.”⁶ Probably, by all opinions, if an agent contracts, really for himself, but ostensibly for an unnamed principal,⁷ or for a fictitious one,⁸ or if he has personally received

¹ *Sandford v. McArthur*, 18 B. Monr. 411; *Webster v. Larned*, 6 Met. 522.

² *Smout v. Ilbery*, 10 M. & W. 1.

³ *Ante*, § 1052, 1053.

⁴ *Rossiter v. Rossiter*, 8 Wend. 494; *Meech v. Smith*, 7 Wend. 314; *Deming v. Bullitt*, 1 Blackf. 241; *Layng v. Stewart*, 1 Watts & S. 222; *Feeter v. Heath*, 11 Wend. 477, 485, and the cases cited to the next section.

⁵ *Ante*, § 247; *Smout v. Ilbery*, 10 M. & W. 1, 9; *Ballou v. Talbot*, 16 Mass. 461; *Jefts v. York*, 4 Cush. 371; *Polhill v. Walter*, 3 B. & Ad. 114; *Colleen v. Wright*, 7 Ellis & B. 301; *Beattie v. Ebury*, Law Rep. 7 Ch. Ap. 777, 791; *Taylor v. Shelton*, 30 Conn. 122; *Lewis*

v. Nicholson, 18 Q. B. 503; *Kroeger v. Pitcairn*, 5 Out. Pa. 311; *Teele v. Otis*, 66 Maine, 329; *Randell v. Trimen*, 18 C. B. 786; *Pow v. Davis*, 1 Best & S. 220, 7 Jur. n. s. 1010; *Eastwood v. Bain*, 3 H. & N. 738.

⁶ *Dusenbury v. Ellis*, 3 Johns. Cas. 70, 71; *Palmer v. Stephens*, 1 Denio, 471, 480; *Sinclair v. Field*, 8 Cow. 543; *Richie v. Bass*, 15 La. An. 668; *Keener v. Harrod*, 2 Md. 63; *Weare v. Gove*, 44 N. H. 196; *Dodd v. Bishop*, 30 La. An. 1178; *White v. Skinner*, 13 Johns. 307.

⁷ *Ante*, § 1076; *Schmaltz v. Avery*, 16 Q. B. 655; *Carr v. Jackson*, 7 Exch. 382.

⁸ *Ridenour v. Mayo*, 40 Ohio State, 9.

the benefit of the contract,¹ he is liable upon it as his own. In these instances, therefore, by all opinions, the law holds him as personally promising, when by the outward fact he promises for another ; because, in truth, the real or supposed other person does not promise. Now, this proposition covers as well the case of an agent who acts for a real principal without authority, as the one for which it is thus formulated. Why, then, should not all the courts apply it as well in the one form of the facts as in the other ? The result would be simply to give the other party an election ; he could still sue the assumed agent, on the implied warranty, or for the tort.

§ 1121. **Responsibility to Principal.** — The agent's responsibility to his principal is various. Not to attempt a complete enumeration, he will be answerable if negligent or careless in the discharge of his duties ;² all his acts must be in the principal's interest, none in his own ;³ or, if he undertakes to deal for himself in his principal's affairs, the latter may appropriate the benefits derivable therefrom ;⁴ he must obey instructions ;⁵ he must render proper accounts,⁶ pay over moneys,⁷ and deliver securities⁸ and other property.⁹ The legal consequences of his misbehavior will be obvious. And we have seen¹⁰ that there are few circumstances in which the agent will escape liability if he fails to charge his principal.

¹ *Railton v. Hodgson*, stated 15 East, 67.

² *Whitney v. Martine*, 88 N. Y. 535 ; *Bumble v. Brown*, 73 N. C. 476 ; *McCrary v. Ashbaugh*, 44 Misso. 410 ; *Allen v. Snyder*, 17 Wend. 368, 20 Wend. 321 ; *Robinson Mach. Works v. Vorse*, 52 Iowa, 207.

³ *Dodd v. Wakeman*, 11 C. E. Green, 484 ; *Byrd v. Hughes*, 84 Ill. 174 ; *Harrington v. Victoria Graving Dock Co.* 3 Q. B. D. 549 ; *Whelan v. McCreary*, 64 Ala. 319.

⁴ *Ante*, § 740 ; *Wheeler v. Willard*, 44 Vt. 640 ; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415 ; *Davis v. Hamlin*, 108 Ill. 39 ; *Motley v. Motley*, 7 Ire. Eq. 211 ; *Seymour v. Shea*, 62

Iowa, 708 ; *Morgan v. Elford*, 4 Ch. D. 352.

⁵ *Adams v. Robinson*, 65 Ala. 586 ; *Hardeman v. Ford*, 12 Ga. 205 ; *Bell v. Cunningham*, 3 Pet. 69 ; *Miner v. Taggart*, 3 Binn. 204 ; *Butts v. Phelps*, 79 Misso. 302.

⁶ *Schedda v. Sawyer*, 4 McLean, 181 ; *Dunwidie v. Kerley*, 6 J. J. Mar. 501 ; *Matthews v. Wilson*, 27 Misso. 155 ; *Ridder v. Whitlock*, 12 How. Pr. 208.

⁷ *Seidel v. Peschkaw*, 3 Dutcher, 427 ; *Reed v. Dougan*, 54 Ind. 306.

⁸ *Rhineland v. Barrow*, 17 Johns. 538.

⁹ *Robertson v. Woodward*, 3 Rich. 251.

¹⁰ *Ante*, § 1118 et seq.

§ 1122. *The Doctrine of this Chapter restated.*

Men, living in communities, are necessarily agents and principals in their own and each other's transactions, almost continually. There never was a person, of adequate capacity, who has not been both. Hence the relation of principal and agent comes often under review by our courts. And to it the following propositions apply:—

First, any act of contracting which a man can do personally he can do, in some form, by agent.

Secondly, no formal authorization of the agent is necessary, unless made so by some special rule of law; but, in fact, he must be authorized when the contracting is done, or it must be subsequently ratified by the assumed principal, or the conduct of the principal must have been such as to estop him to deny the agency.

Thirdly, the agent stands in the place of the principal; who, therefore, is bound by his contracts, and is entitled to avail himself of them, the same as though made by himself.

Fourthly, if the agent acts as principal, he is personally holden; otherwise, doing no more than is incumbent on him as agent, he incurs no liability.

Fifthly, if persons deal with an agent, reasonably supposing him to be a principal, they may still have their remedies against the principal, when informed of their mistake; but, if they know how the fact is while making the contract, yet choose to deal with the agent as principal, they cannot afterward recede from their own voluntary bargain, and come upon the other.

Sixthly, by the common law, some exceptions to these rules have been established for specialties; and, by statutes, there have been some as to simple contracts.

Seventhly, the principal can in no circumstances avail himself of a contract fraudulently procured by the agent, without being responsible also for the fraud. If he authorized it, he is liable; if the agent, in carrying out the agency, practised it without authority, the principal is liable; if the latter rati-

fied an unauthorized contract, which had been procured for him through fraud, he is responsible, since he cannot accept a part and reject the rest.

Eighthly, the agent is answerable for his own fraud, whether the principal commanded it or not; such command, if given, is simply void.¹

Ninthly, one contracting as agent for another warrants in matter of law, to the person with whom he deals, that he is such agent, and is acting within his authorization.

Tenthly, the principal can at will discharge his agent, being answerable to him for any breach of contract involved therein. And, by operation of law, the agency is terminated by the death or insanity of either principal or agent.

¹ Goodhue v. McClarty, 3 La. An. 56.

CHAPTER XLI.

SPECIAL SORTS OF AGENTS.

§ 1123. **Law's Growth.** — The elucidations of this chapter will illustrate, in part, the manner in which, otherwise than by legislation, the law grows. They will show how usage ripens into law;¹ and how false is the term “judicial legislation,” when applied, as it often is by the misinformed, to the decisions of our judicial tribunals. The courts do not make custom, but the people do; and, when what has thus sprung up from the people has so grown as to be universally recognized and followed, the courts take, as they should, judicial cognizance of it. The people, who make the language, and make the legislature, have thus created directly, and neither by legislative nor judicial help, what everybody calls law.² Again, a controversy arises between two men, not stirred up by the courts, and the judges do what the people require of them; namely, decide it. The primary command to them is to settle the controversy; the secondary, to follow therein, as well as diligence and their capacities enable them, the law. The people, in requiring them so to act, conclusively imply that there is for the case a law, which they are to find. When they declare that they have found it, by what right does a man whose vision does not discern it, pronounce the law to be judge-made? Of necessity, our judges, who are mortal, and not all of whom have juridical minds, and not all are deeply learned in the law, sometimes err. To say, therefore, that they err, may be true. But it is always false to declare that they, whose business it is to expound and enforce

¹ Ante, § 445.² See the entire chapter, ante, § 438–460.

the law which they find, make law. "Judge-made law" is a thing absolutely without existence among us. That the courts follow prior decisions is not their fault, for the law requires it of them. If the law in this respect is not satisfactory to the people, the legislature should ordain its repeal.¹

§ 1124. **Diverse Agencies** — (**Custom** — **Adjudication**). — Business, in a civilized community, creates its special channels, and therein it mostly flows. And, to a considerable extent, the different sorts of business require agencies specially adapted each to itself. The salesman, who assists the trader in the latter's shop or store, exercises functions different from those of the broker. The lawyer, in conducting his client's cause in court, is an agent differing from both the others. A commission merchant, too, is an agent, but his functions are neither those of a salesman in a store, nor of a broker, nor are they those of a lawyer. There are considerable numbers of agencies more or less differing. The general law of agency governs all, subject to such qualifications as come from the special sort. These qualifications have been produced in the two ways mentioned in the last section. Customs have grown up, in each particular agency, more or less regulating it. Some have not ripened into law, and parties who rely on them must prove them. Others have become a part of the law, whereof the courts take judicial cognizance.² Again, a question special to the individual sort of agency arises before the courts, and they decide it. When the like question next presents itself to a tribunal of the same State, the former decision will probably be controlling; when, before a court in another State, it will almost certainly be followed if right, and not improbably if wrong.³ Thus a series of precedents create what, as shown in the last section, is falsely termed "judge-made law;" pertaining, not to the law of agency in general, but to the particular sort of agency. To illustrate, —

§ 1125. *Attorney-at-Law* : —

Officer of Court. — According to American usage at the

¹ Compare with ante, § 4-15.

³ Ante, § 11-15.

² Ante, § 378, 438-460.

present day, differing from the English, every legal practitioner is an attorney. And an attorney-at-law is, while he is the client's agent,¹ likewise an officer of the court in which he practises.² He has taken the oath of his office to be faithful to the court, as well as to his client.³ And he may be summarily punished for official wrong doings.⁴ Now, —

§ 1126. **Consequently,** — In that *reason* which constitutes the law,⁵ we discover, as resulting from the official character of the attorney-at-law, what distinguishes him, not widely, but in some degree, from other agents. Thus, because he is an officer, he must, like other officers,⁶ be presumed *prima facie* to have done his official duty; which, in this case, is, not his duty to his client, whose officer he is not; but to the court, whose officer he is. For example, a sheriff, or other officer of the court to serve process, must return it;⁷ then, if he does, his certificate thereof is held to be, presumptively or conclusively, according to the nature of the case, correct; and it does not, as would a like writing from a person not an officer, require extraneous proof.⁸ Thereupon, should a question newly arise as to an attorney's rights and acts in court, its decision will create no new law, the judges will merely apply to it the plain and settled doctrines concerning the mutual relations of courts and their officers. The case will constitute a precedent to be cited when other like cases arise,⁹ and the writer of a text-book may have a paragraph on the topic; so that new law will *seem* to have been made,

¹ Spinks v. Davis, 32 Missis. 152; Ingraham v. Leland, 19 Vt. 304; Valentine v. Stewart, 15 Cal. 387; Ex parte Rogers, Law Rep. 3 C. P. 490.

² Close v. Gillespey, 3 Johns. 526; Norwich v. Berry, 4 Bur. 2109, 2115, 2116; Austin's Case, 5 Rawle, 191.

³ Champion v. The State, 3 Coldw. 111; In re Comroodeen Tyabjee, 1 Ellis & E 319, 4 Jur. n. s. 1108.

⁴ 2 Bishop Crim. Law, § 255; Pierce v. Blake, 2 Salk. 515; In re Percy, 36 N. Y. 651; Anonymous, 6 Mod. 187; In re Peterson, 3 Paige, 510.

⁵ Ante, § 14, 15.

⁶ 1 Bishop Crim. Proced. § 1131.

⁷ Ib. § 187; Lawrence v. Rice, 12 Met. 535, 541; Gallup v. Robinson, 11 Gray, 20; People v. Johnson, 4 Bradw. 346.

⁸ Whithead v. Keyes, 3 Allen, 495, 498; Huntress v. Tiney, 39 Maine, 237; Kingsbury v. Buchanan, 11 Iowa, 387; Owens v. Ranstead, 22 Ill. 161; Ingraham v. McGraw, 3 Kan. 521; Newton v. State Bank, 14 Ark. 9; Foster v. Dryfus, 16 Ind. 158.

⁹ Ante, § 10-13.

but in truth it will be the law which existed before, though not found expressed in terms in the books. Thus, —

§ 1127. **Appearance for Client.** — Such adjudications have already been made. Not always, perhaps, have the judges making them been duly careful as to the form of the argument;¹ but, at least, they have established the satisfactory conclusion, that the official character of an attorney creates the presumption of authority when he appears in court for a client; which, though it may be questioned, can be overcome only by circumstances or evidence affirmatively and distinctly controlling. Some of the cases give even greater effect to the presumption of the attorney's authorization.² But, where an act in court, such as the waiver of process, has been done by one not admitted as an attorney, there will be no presumption of authority, without proof of which the steps taken thereon will be erroneous.³

§ 1128. **Other Things.** — Besides this question of appearance, there are a few other things depending on the attorney's being an officer of the court. But, in most affairs, he is governed by the general law of agency, explained in the last chapter. Thus, —

§ 1129. **Changing Attorney.** — Since a principal can discharge his agent at pleasure,⁴ so can a client his attorney, or substitute another; simply, in the manner of doing it, removing any intervening liens, and otherwise conforming to the law and to the rules of the court.⁵ Or, for the like reason, and under like restrictions, the attorney can withdraw at pleasure.⁶ These are results derivable from the general law

¹ Ante, § 12.

² *Wheeler v. Cox*, 56 Iowa, 36; *Anonymous*, 1 Salk. 86; *Hamilton v. Wright*, 37 N. Y. 502; *Dobbins v. Dupree*, 39 Ga. 394; *People v. Mariposa Co.* 39 Cal. 683; *Abbott v. Dutton*, 44 Vt. 546; *Smith v. Stewart*, 6 Johns. 34; *Manchester Bank v. Fellows*, 8 Fost. N. H. 302; *Thomas v. Steele*, 22 Wis. 207; *Hellman v. McWhennie*, 3 Rich. 364; *Osborn v. Bank of United States*, 9 Wheat. 738; *Clark v. Willett*, 35 Cal.

534; *Penobscot Boom Corp. v. Lamson*, 16 Maine, 224.

³ *Fowler v. Morrill*, 8 Texas, 153.

⁴ Ante, § 1050.

⁵ *Yoakley v. Hawley*, 6 Lea, 670; *Wells v. Hatch*, 43 N. H. 246; *Hazlett v. Gill*, 5 Rob. N. Y. 611; *Sloo v. Law*, 4 Blatch. 268; *McLaren v. Charrier*, 5 Paige, 530; *Gibbons v. Gibbons*, 4 Harring. Del. 105.

⁶ *Boyd v. Stone*, 5 Wis. 240; *United States v. Curry*, 6 How. U. S. 106; *Love v. Hall*, 3 Yerg. 408.

of agency ; and the decisions of courts concerning them have simply added to the evidences of the law, they have created nothing.

§ 1130. **Other Deductions** — are easy and numerous. But a mere illustrative exposition, not a full one, being the purpose of this chapter, let us pass to —

§ 1131. *Auctioneer* : —

Defined. — An auctioneer is one who, dealing with assembled persons competing, sells property to those who make or accept the offers most favorable to the owners.¹ Now, —

§ 1132. **Origin and Nature.** — Auctions and auctioneers, — the calling together of people and making sales to those who will purchase on the best terms to the owners, — arise spontaneously out of the very nature of business. It would be impossible, therefore, that there should not be a custom defining their methods and limits. And we have seen that they are matter of public concern.² Consequently it has been from early times, and it remains, the practice to license approved persons to be auctioneers, and forbid unlicensed ones to act as such. The judges did not make this law, it came from the people and from legislative power. The auctioneer is, on general principles, entitled to be paid ; and usage, which seems to have partly ripened into law, and partly to remain

¹ For the nature of legal definitions, see ante, § 184, note. I have not observed in the books any satisfactory definition of an auctioneer. Even Story puts what seems to have been meant for a definition very loosely ; thus, "An auctioneer is a person who is authorized to sell goods or merchandise at public auction or sale for a recompense, or (as it is commonly called) a commission." Story Agency, § 27. My definition is silent as to his remuneration or the manner of it : in which respect Story's is to be preferred if this is really an element in the question. But though ordinarily an auctioneer, like any other agent, is paid, he is not the less such if he does the work gratuitously. The State v. Rucker, 24 Misso. 557. Nor does he cease to be an auctioneer though

he sells his own property. Bent v. Cobb, 9 Gray, 397. Therefore the definition may well be silent as to the matter of agency. Nor is he the less an auctioneer though, selling his own property, he conducts the competition by some method other than outcry. Rex v. Taylor, McClel. 362, 13 Price, 636. Story's definition is defective in not comprehending the auctioneer of real estate. Emmerson v. Heelis, 2 Taunt. 38, 47 ; Dobell v. Hutchinson, 3 A. & E. 355. It may be a question whether mine is not defective in not extending to such a case as the letting out of the board of paupers to the lowest bidder, and various other cases of procuring a contract other than a purchase of property.

² Ante, § 528.

matter for proof in each case, has fixed the form of payment to be by a commission on the sales, and has not been altogether silent as to the amount.¹

§ 1133. **Further of Rights and Duties.** — In other respects, the rights and duties of the auctioneer have become well defined in the law; but usage and judicial decision have so grown up together that, as to some of them, it is not easy to say how much had its origin in the one and how much in the other. The auctioneer has a lien, for his commission and expenses, on goods put into his hands for sale; he has a special ownership in them, and not the mere custody of an ordinary agent or servant; he may maintain against the purchaser a suit for the price, though the owner is known; and all this is so even where he sells the goods on the owner's premises, to bidders cognizant of the facts.² Though these propositions involve more or less of judicial decision, they are simply, so far as they are not usage, deductions from usage; proceeding, not from judicial legislation, but from what is otherwise established in the law. In respect of things not necessarily modified by the peculiar usage, the relation of an auctioneer to his employer is governed by the rules of agency laid down in the last chapter. For example, —

§ 1134. **Viewed as Ordinary Agent.** — Since the auctioneer holds himself out as simply the seller of goods by auction,³ he cannot without special authority — which, however, is in practice often given — make a private sale;⁴ nor, except under a custom, can he sell by auction on credit,⁵ nor can he rescind a sale which he has made.⁶ Being an agent in whom

¹ *Robinson v. Green*, 3 Met. 159, 161; *Maltby v. Christie*, 1 Esp. 340; *Green v. Bartlett*, 14 C. B. n. s. 681; *Succession of Navarro*, 24 La. An. 105; *Girardey v. Stone*, 24 La. An. 286.

² *Williams v. Millington*, 1 H. Bl. 81; *Minturn v. Main*, 3 Selden, 220; *Grice v. Kenrick*, Law Rep. 5 Q. B. 340; *Woolfe v. Horne*, 2 Q. B. D. 355; *Beller v. Block*, 19 Ark. 566; *Hulse v. Young*, 16 Johns. 1; *Flanigan v. Crull*, 53 Ill. 352.

³ *Story Agency*, § 27; *Beller v.*

Block, 19 Ark. 566; *Hulse v. Young*, 16 Johns. 1; *Minturn v. Main*, 3 Selden, 220; *Blood v. French*, 9 Gray, 197; *Boinest v. Leigne*, 2 Rich. 464; *McMechen v. Baltimore*, 3 Har. & J. 534.

⁴ *Story Agency*, § 27; *Marsh v. Jelf*, 3 Fost. & F. 234; *Daniel v. Adams*, Amb. 495.

⁵ *Williams v. Evans*, Law Rep. 1 Q. B. 352, 354; *Sykes v. Giles*, 5 M. & W. 645.

⁶ *Boinest v. Leigne*, 2 Rich. 464; *Nelson v. Aldridge*, 2 Stark. 435.

is reposed a personal confidence,¹ he cannot delegate his authority to another;² but, because it is a general principle of the law that any act which one performs for another while the two are together is the other's act as well as the personal act of him who does it,³ the auctioneer may depute to another person the making of the outcry and the swinging of the hammer.⁴ He must, like other agents, follow the instructions of the principal,⁵ and must pay over moneys and otherwise account to him.⁶ These are illustrations of the broader truth, that an auctioneer is governed by the general law of agency; except as to the few particulars in which custom, under judicial supervision, has built up a rule special to this sort of agent. And there is, in this branch of the law, nothing which can with any propriety be termed judicial legislation.

§ 1135. *Broker* :—

Defined.—A broker is one who, as middleman, brings persons together to bargain, or bargains for them, in the private purchase or sale of property of any sort, not ordinarily in his possession. There are various commonly recognized divisions of this craft;⁷ such as bill and note broker, exchange broker, insurance broker, merchandise broker, pawnbroker, real estate broker, ship broker, stock broker.⁸ Hence, —

§ 1136. **Functions**—(Distinguished from Auctioneer).—A broker has no special property in goods which he may be authorized to sell, he must sell them as the principal's, and at

¹ Ante, § 1067.

² *Stone v. The State*, 12 Misso. 400; *Commonwealth v. Harnden*, 19 Pick. 482.

³ Ante, § 1047.

⁴ *Commonwealth v. Harnden*, supra.

⁵ *Bush v. Cole*, 28 N. Y. 261; *Hood v. Adams*, 128 Mass. 207; *Williams v. Poor*, 3 Cranch C. C. 251.

⁶ *Tripp v. Barton*, 13 R. I. 130; *Brown v. Staton*, 2 Chit. 353.

⁷ *Bouv. Law Dict. Brokers*.

⁸ The books give us various definitions of broker; "the true" one, says Story, "seems to be, that he is an agent employed to make bargains and con-

tracts between other persons, in matters of trade, commerce, or navigation, for a compensation, commonly called brokerage." *Story Agency*, § 28. And he quotes with approbation the definition of Tindal, C. J.; thus, "A broker is one who makes a bargain for another, and receives a commission for so doing; as, for instance, a stock broker. But, in common parlance, one who receives payment of freights for the ship owner, and negotiates for cargoes, is a broker." *Pott v. Turner*, 6 Bing. 702, 706. And see *Mollett v. Robinson*, *Law Rep. 7 C. P.* 84, 97.

private sale, not at auction; nor has he, on making a sale, even implied authority to receive payment.¹ He does not commonly possess the right of general lien.² Consequently—

§ 1137. **In General.**—He is, as to most things, governed by the general law of agency, explained in the last chapter. And there are sometimes local usages, which should be taken into the account. To illustrate the way in which the law of the subject has grown into its present shape would be little else than a repetition of what has already been said in this chapter.

§ 1138. *Factor or Commission Merchant*:—

Defined.—These terms are nearly or quite synonymous. The former is the more common in the language of the law; the latter, in the language of commerce. The factor may be authorized to buy, but commonly his function is simply to sell; and he is one to whom goods are consigned to be sold, on commission, either in his own or the principal's name,—the law vesting in him a special property therein.³

§ 1139. **How sell.**—The factor cannot sell at auction, his sales may be, and commonly are, in his own name; and, in the absence of any usage or agreement to the contrary, they may be, if he pleases, on credit.⁴ He cannot barter the goods.⁵ Still, where not otherwise instructed, he may follow any proper local usage, duly known and proved.⁶

§ 1140. **Lien.**—A factor often makes advances to his principal. For which, for his commissions, and for any balance due him, he has a lien on the goods in his possession,—dif-

¹ Story Agency, § 28-32; Xenos v. Wickham, Law Rep. 2 H. L. 296; Fairlie v. Fenton, Law Rep. 5 Ex. 169; Calder v. Dobell, Law Rep. 6 C. P. 486; Baxter v. Duren, 29 Maine, 434; Touro v. Cassin, 1 Nott & McC. 173; McGavock v. Woodlief, 20 How. U. S. 221; Colvin v. Williams, 3 Har. & J. 38; Higgins v. Moore, 34 N. Y. 417; Kock v. Emmerling, 22 How. U. S. 69; Bailey v. Chapman, 41 Misso. 536; Shepherd v. Hedden, 5 Dutcher, 334.

² Barry v. Boninger, 46 Md. 59.

³ Story Agency, § 33-34 a; Fuentes v. Montis, Law Rep. 3 C. P. 268, 4 C. P. 93; Cole v. Northwestern Bank, Law

Rep. 9 C. P. 470, 10 C. P. 354; Hopkirk v. Bell, 4 Cranch, 164; Taylor v. Wells, 3 Watts, 65; Rapp v. Palmer, 3 Watts, 178; Smart v. Sandars, 3 C. B. 380.

⁴ West Boylston Manuf. Co. v. Searle, 15 Pick. 225; Goodenow v. Tyler, 7 Mass. 36; Goldthwaite v. McWhorter, 5 Stew. & P. 284; Byrne v. Schwing, 6 B. Monr. 199; Baring v. Corrie, 2 B. & Ald. 137, 143.

⁵ Guerreiro v. Peile, 3 B. & Ald. 616.

⁶ Dwight v. Whitney, 15 Pick. 179; Etheridge v. Binney, 9 Pick. 272; Clark v. Van Northwick, 1 Pick. 343; Goode-nov v. Tyler, supra.

fering herein from an ordinary agent.¹ But, for this purpose, he must have actual or potential possession of the goods.² The lien is a personal privilege; he may lose it by delivering the things,³ by otherwise voluntarily parting with his possession,⁴ or by tortiously pledging them.⁵ Now, —

§ 1141. **Legal Conclusions.** — Out of what thus appears to have sprung up from usage, under the fosterings of judicial decision, we may derive whatever is special to this class of agents. For the rest, we have only to consult the general law of agency. And all this is within explanations already made concerning usage, which proceeds from the public, and adjudication, which comes from the courts.

§ 1142. *The Doctrine of this Chapter restated.*

From the elucidations of this chapter, we have a practical view of the separate and connected forces, other than legislation, which, either actually, or according to popular ideas, make law. In real truth, the people do, by their customs, make it. They cannot, in this way, having invested the legislature with all legislative power, enact a statute.⁶ But that they still can, otherwise than through the legislature, ordain what has the force of law, illustrates a general doctrine of the utmost importance in our jurisprudence. It is, that the establishment of one thing is not the overthrow of another evidently not meant to be discarded; but, in such a case, each stands as a limitation of, or exception to, the other. Therefore if, before the establishment of our constitutions, it had been the practice of the courts to create law by their decisions, they might continue to do it. That, in truth, they do not so proceed has already been sufficiently explained.

¹ *Kruger v. Wilcocks*, 1 Keny. 32; *Coit*, 3 Selden, 288; *Brown v. Wiggin*, 16 N. H. 312.

Stevens v. Biller, 25 Ch. D. 31; *Matthews v. Menedger*, 2 McLean, 145; *Jordan v. James*, 5 Ohio, 88, 99; *Sturgis v. Slacum*, 18 Pick. 36, 40.

³ *Matthews v. Menedger*, *supra*.

⁴ *Holly v. Huggefords*, 8 Pick. 73.

² *Oliver v. Moore*, 12 Heisk. 482; 396.

⁵ *Jarvis v. Rogers*, 15 Mass. 389,

Burrus v. Kyle, 56 Ga. 24; *Winter v.*

⁶ *Bishop Written Laws*, § 36.

CHAPTER XLII.

PERSONS IN PARTNERSHIP.

§ 1143. **Relations of Subject.** — Business partnerships have grown out of the same convenience and necessities of trade as the special agencies treated of in our last chapter. And, like them, they derive their legal rules chiefly from the general law of agency, modified in some degree by usage, and made exact by judicial decision. So that this chapter is merely a continuation of the last; and to it are equally applicable the expositions concerning custom and judicial legislation.

§ 1144. **On what Principle.** — The principle governing contracts by partners is, that, within the scope of the partnership business, the one who makes the contract is, while acting personally for himself, the agent for the rest.¹ And where a liability is sought to be cast on one as being a partner with another who primarily incurred it, the true test is, whether or not he either directly or impliedly constituted the other his agent, with powers extending to the transaction.² Such being the doctrine nearly or quite universal, the authority of a partner to bind the firm is mainly a deduction from what is set down in our chapter before the last. Thus, —

§ 1145. **One Partner's Power.** — As to third persons, a single partner can bind the firm by any simple contract within the sphere of its operations as presented to the public.³ But, as

¹ Smith Con. 2d Eng. ed. 339; Pa. 498; *Bowman v. Cecil Bank*, 3 Wheatcroft v. Hickman, 9 C. B. N. S. Grant, Pa. 33.

47, 8 H. L. Cas. 268, 7 Jur. N. S. 105; ² *Bullen v. Sharp*, Law Rep. 1 C. P. 86, 12 Jur. N. S. 247; *Cox v. Hickman*, 733; *Yeager v. Wallace*, 7 Smith, Pa. 8 H. L. Cas. 268.

365; *London Savings Fund Society v. Hagerstown Savings Bank*, 12 Casey, ³ *Catlin v. Gilders*, 3 Ala. 536; *Frost v. Hanford*, 1 E. D. Smith, 540; Liv-

between its members, the case is different. Subject to limitations growing out of the doctrine of agency coupled with an interest,¹ and perhaps other limitations inherent in the nature of the partnership, the authority may be withheld from one by the others, or after being given it may be revoked even by a single dissenting member; whereupon a third person, who has notice of this, cannot make with the disqualified partner a contract by which the firm will be bound.² These are obvious deductions from the general law of agency, explained in the chapter before the last. Again, —

§ 1146. **Undisclosed Partners — (Suing them).** — We there saw that, when an agent making a contract in his own name does not disclose his agency, his principal, on being discovered, is liable to be sued thereon.³ Applying this rule to the matter now in hand, one who in ignorance of a partnership bargains with a member in an affair pertaining to it, supposing himself to be giving credit only to the individual, — or deals with an ostensible firm while there is in fact a silent partner, — may, if he chooses, on learning the facts, sue the firm in the one case, or the whole firm including the silent partner in the other, upon the contract.⁴ But, by the common law, if he recovers judgment against a part of the persons who are thus joint promisors, whereby the original debt is merged in the record, he is too late to sue the party not theretofore known.⁵ In like manner, —

§ 1147. **Bringing Suit.** — Under facts of this sort, a suit

ingston v. Roosevelt, 4 Johns. 251;

Nichols v. James, 130 Mass. 589;

Thompson v. Toledo Bank, 111 U. S. 529.

¹ Ante, § 1051.

² Langan v. Hewett, 13 Sm. & M. 122; Johnston v. Dutton, 27 Ala. 245; Leavitt v. Peck, 3 Conn. 124; Bull v. Harris, 18 B. Monr. 195; Gallway v. Mathew, 10 East, 264; Willis v. Dyson, 1 Stark. 164. See Johnston v. Bernheim, 86 N. C. 339; Wilkins v. Pearce, 5 Denio, 541; s. c. nom. Pearce v. Wilkins, 2 Comst. 469. A minuter examination of this question in the books will disclose some discords in the decisions, and some judicial doubts.

³ Ante, § 1079.

⁴ Beckham v. Drake, 9 M. & W. 79; Drake v. Beckham, 11 M. & W. 315; Holden v. Bloxum, 35 Missis. 381; Reynolds v. Cleveland, 4 Cow. 282; Roth v. Moore, 19 La. An. 86; Tucker v. Peaslee, 36 N. H. 167; Baxter v. Clark, 4 Ire. 127; Given v. Albert, 5 Watts & S. 333; Bisel v. Hobbs, 6 Blackf. 479; Griffith v. Buffum, 22 Vt. 181; Dishon v. Schorr, 19 Ill. 59.

⁵ Ante, § 877; King v. Hoare, 13 M. & W. 494; Kendall v. Hamilton, 3 C. P. D. 403.

against the party contracting, brought on behalf of the firm,¹ may, at pleasure, be in the name of the entire firm, or of the individual, or part of the firm, wherewith the contract was in fact made.² So,—

§ 1148. **Notice on Retiring.**—As an ordinary principal, on putting an end to the agency, must, to avoid liability to third persons afterward in ignorance dealing with the agent, give due notice of its termination,³ so must a retiring partner give notice, or he will be responsible to those who subsequently, not knowing of the dissolution of the firm, bargain with its remaining members.⁴ For protection against parties not theretofore having transactions with the partnership, it may be a general notice to the public;⁵ against former customers, there must be actual notice to them.⁶ Or, even as to the latter, it will suffice if in any way knowledge of the dissolution actually comes to them, or they are duly put on inquiry.⁷

§ 1149. **How Sign.**—A partner, in executing a simple contract in writing to bind the firm, usually signs the firm's name. But it is equally good in law, if, instead of this, he writes the names of the individual partners.⁸ Still the implied authority of one partner to sign for another is to employ therein the name which the partnership holds out to the

¹ Ante, § 1080.

² *Cothay v. Fennell*, 10 B. & C. 671; *Ward v. Leviston*, 7 Blackf. 466; *Wood v. O'Kelley*, 8 Cush. 406; *Clarkson v. Carter*, 3 Cow. 84; *Clark v. Miller*, 4 Wend. 628; *Rogers v. Kichline*, 12 Casey, Pa. 293; *Curtis v. Belknap*, 21 Vt. 433; *Trott v. Irish*, 1 Allen, 481.

³ Ante, § 1105.

⁴ *Kenney v. Altvater*, 27 Smith, Pa. 34; *Carmichael v. Greer*, 55 Ga. 116; *Gammon v. Huse*, 100 Ill. 234; *Richards v. Hunt*, 65 Ga. 342; *Richards v. Butler*, 65 Ga. 593; *Uhl v. Harvey*, 78 Ind. 26.

⁵ *Backus v. Taylor*, 84 Ind. 503; *Godfrey v. Turnbull*, 1 Esp. 371; *Wright v. Pulham*, 2 Chit. 121; *Gorham v. Thompson*, Peake, 42. Nor, indeed, is even such notice, as to such

parties, in all circumstances required. *Gaar v. Huggins*, 12 Bush, 259.

⁶ *Haynes v. Carter*, 12 Heisk. 7; *Gilchrist v. Brande*, 58 Wis. 184; *Austin v. Holland*, 69 N. Y. 571; *In re Krueger*, 2 Low. 66; *Holland v. Long*, 57 Ga. 36; *Stewart v. Sonneborn*, 51 Ala. 126; *Shamburg v. Ruggles*, 2 Norris, Pa. 148; *Graham v. Hope*, Peake, 154.

⁷ *Uhl v. Bingaman*, 78 Ind. 365; *Laird v. Ivens*, 45 Texas, 621; *Lovejoy v. Spafford*, 93 U. S. 430; *Gilchrist v. Brande*, supra; *Austin v. Holland*, supra.

⁸ *Patch v. Wheatland*, 8 Allen, 102; *Holden v. Bloxum*, 35 Missis. 381; *McGregor v. Cleveland*, 5 Wend. 475; *Norton v. Seymour*, 3 C. B. 792. And see *Maynard v. Fellows*, 43 N. H. 255.

public; and any such or so great departure as infers a transaction not on account of the particular firm, will leave the signature obligatory only on him who executes it.¹ This question is partly for the jury; yet, within the rule thus appearing, "The Newcastle Coal Company" is not the same name as "The Newcastle and Sunderland Wall's End Coal Company;"² nor is "John Blurton & Company" the same as "John Blurton."³ For practical reasons, a seal should not be attached unless required by law; and, when it is, the proper formalities should be observed. Thus, —

§ 1150. *Instruments under Seal*: —

How Practically. — Whatever be the strict law as to the various possible methods of executing a specialty by a partnership, practically the individual names of the partners should be given in the body of the instrument, with the recitation that they are partners composing a firm also named; and each partner should with his own hand subscribe his name opposite his several seal. This will certainly be right, the proof be easy, and no unpleasant questions of law or fact can follow.⁴ Inquiring, next, after the indispensable, —

§ 1151. **Power of One Partner.** — Since a partner, acting for his firm, binds the other members simply because he is their agent,⁵ it follows that he cannot validly execute for all an instrument under seal; except pursuant to a sealed authorization,⁶ — a thing not within the ordinary course of partnership dealings. So that, as, for example, the title to real estate does not pass without deed, one partner cannot convey away, either absolutely or in mortgage, the firm's lands; his deed transmitting nothing beyond his own interest.⁷ Nor is this otherwise though the partnership articles are sealed; "unless," said Lord Kenyon, "a particular power be given

¹ Faith v. Richmond, 11 A. & E. 339, 341, 342.

² Ib.

³ Kirk v. Blurton, 9 M. & W. 284.

⁴ And compare with ante, § 111, 112, 116, 342-348, 357, 362, 426, 772-775.

⁵ Ante, § 1143, 1144.

⁶ Ante, § 1045.

⁷ Goddard v. Renner, 57 Ind. 532; Printup v. Turner, 65 Ga. 71. See Chittenden v. German-American Bank, 27 Minn. 143; post, § 1152.

for that purpose.”¹ If the partners are together, and one with the concurrence of the rest signs the firm’s name opposite several seals or one, it is good;² because, by reason of the presence,³ the act of the one is the act of all.⁴

§ 1152. **Unauthorized Sealing, so not Firm’s Deed.**—If an ordinary agent, with power to execute for his principal a simple contract but not a specialty, affixes a seal, it is rejected as surplusage, and the instrument takes effect as an unsealed written contract.⁵ Then, if a partner is the agent, not duly authorized by his copartners, but acting both for himself and them, how is it? We come here upon an apparent chaos in the authorities. A written contract will always be so construed as, if possible, to have legal effect, and carry out the manifest purpose of the parties.⁶ But where a deed is meant to be that of an entire firm, and in law it can be that only of one member, this rule is not satisfied if it is interpreted as the

¹ *Harrison v. Jackson*, 7 T. R. 207, 210; *McCullough v. Sommerville*, 8 Leigh, 415; *Gerard v. Basse*, 1 Dall. 119; *Trimble v. Coons*, 2 A. K. Mar. 375; *Lambden v. Sharp*, 9 Humph. 224; *Hart v. Withers*, 1 Pa. 285; *McDonald v. Eggleston*, 26 Vt. 154; *Pierson v. Hooker*, 3 Johns. 68; *Donaldson v. Kendall*, 2 Ga. Dec. 227; *Napier v. Catron*, 2 Humph. 534; *Morris v. Jones*, 4 Harring. Del. 428; *Henry v. Gates*, 26 Misso. 315. On the other hand, not quite consistently with this doctrine or other sound legal principle, there are cases which seem to hold that, if there is a prior oral authority or subsequent oral ratification from the other partners, the instrument will constitute the firm’s deed. *Grady v. Robinson*, 28 Ala. 289; *Herbert v. Hanrick*, 16 Ala. 581; *Drumright v. Philpot*, 16 Ga. 424; *Shirley v. Fearn*, 33 Missis. 653; *Haynes v. Seachrest*, 13 Iowa, 455; *Ely v. Hair*, 16 B. Monr. 230; *Pike v. Bacon*, 21 Maine, 280; *Cady v. Shepherd*, 11 Pick. 400; *Clement v. Brush*, 3 Johns. Cas. 180; *Swan v. Stedman*, 4 Met. 548; *Fox v. Norton*, 9 Mich. 207; *Gwinn v. Rooker*, 24 Misso. 290; *Smith v. Kerr*, 3 Comst.

144; *Gram v. Seton*, 1 Hall, 262; *Bond v. Aitkin*, 6 Watts & S. 165; *Johns v. Battin*, 6 Casey, Pa. 84; *Herzog v. Sawyer*, 61 Md. 344; *Lowery v. Drew*, 18 Texas, 786; *Wilson v. Hunter*, 14 Wis. 683. And see *Walsh v. Lennan*, 98 Ill. 27; post, § 1167–1172.

² *Ball v. Dunsterville*, 4 T. R. 313; *Day v. Lafferty*, 4 Pike, 450; *Lee v. Onstott*, 1 Pike, 206; *Henderson v. Barbee*, 6 Blackf. 26; *Price v. Alexander*, 2 Greene, Iowa, 427.

³ Ante, § 345, 1047, 1048.

⁴ And see *United States v. Astley*, 3 Wash. C. C. 508; *Fleming v. Dunbar*, 2 Hill, S. C. 532; *Modisett v. Lindley*, 2 Blackf. 119; *Posey v. Bullitt*, 1 Blackf. 99; *Fichthorn v. Boyer*, 5 Watts, 159; *Mackay v. Bloodgood*, 9 Johns. 285; *Little v. Hazzard*, 5 Harring. Del. 291.

⁵ Ante, § 111, 1046, 1049.

⁶ Ante, § 380, 383, 384, 391, 394; 2 Saund. Wms. ed. 96 b, note; *Randel v. Chesapeake & Delaware Canal*, 1 Harring. Del. 151; *Stockton v. Turner*, 7 J. J. Mar. 192; *Bush v. Watkins*, 14 Beav. 425; *Milbourne v. Simpson*, 2 Wils. 22.

act of the one. In such a case, assuming the partner not to be authorized to make even a simple contract binding the rest, the whole would, in reason, seem to be void or voidable.¹ But, since a writing which was intended to be a deed of realty, yet is imperfect from want of a seal, is in law an agreement to convey,² — in other words, a conveyance in equity, — it would seem to follow that a deed of partnership lands, from a partner who had an unsealed authority, might perhaps be construed as transmitting a legal title from him, and an equitable from the other partners. Still, as plainly he meant to stand simply on an equality with them, it may be the sounder interpretation to reject his seal with theirs; so that, as to all, the effect will be an equitable bargaining away of the land. These questions, and analogous ones, presenting many varying aspects, are inherently difficult because of the conflicts of legal principles involved in them.³ Some of the adjudged cases are cited in the note.⁴ The just solution may not always be the same in States wherein specialties have been reduced to the analogies of simple contracts, as in those where the purer common law prevails.

§ 1153. *The Doctrine of this Chapter restated.*

The power of partners to bind one another by contract pertains to the law of agency. Each acts as agent for the others, and principal for himself. But the agency does not extend to the making of specialties; which, therefore, though relating to the partnership business, should be executed by the several members of the firm as individuals. Undoubtedly, if they chose, they could, in their articles of copartnership,

¹ Ante, § 347, 348.

² Ante, § 394.

³ Ante, § 994, note.

⁴ Banorgue v. Hovey, 5 Mass. 11; Dillon v. Brown, 11 Gray, 179; Milton v. Mosher, 7 Met. 244; Schmertz v. Shreeve, 12 Smith, Pa. 457; Lucas v. Darien Bank, 2 Stew. 280; Human v. Cuniffe, 32 Misso. 316; Gunter v.

Williams, 40 Ala. 561; McCullough v. Sommerville, 8 Leigh, 415; Daniel v. Toney, 2 Met. Ky. 523; Hoskinson v. Eliot, 12 Smith, Pa. 393; Dodge v. McKay, 4 Ala. 346; Scott v. Dansby, 12 Ala. 714; Massey v. Pike, 20 Ark. 92; Smith v. Tupper, 4 Sm. & M. 261; Turbeville v. Ryan, 1 Humph. 113.

by an express provision, authorize each partner, or a particular one, to enter into contracts under seal in behalf of all, provided the articles were themselves under seal. This would not be convenient for persons dealing with the firm; because, in prudence, he who accepts a sealed instrument, executed by any agent, should have under his control the means of proving the agency.

In simple contracts, which constitute the ordinary bargainings of partners, there are no similar technical rules; but the contract of one, made in the firm's name, within the scope of the partnership business, has precisely the same effect as though signed by all.

CHAPTER XLIII.

OTHER UNINCORPORATE ASSOCIATIONS.

§ 1154. **Compared with Partnerships.** — While partners contract under the general law of agency, slightly modified by such usages and judicial determinations as relate to this special branch of it,¹ associations which are neither partnerships nor corporations contract under the same general law; and the modifying usages and decisions, if any, are those which concern the particular sort of association.² Moreover, —

§ 1155. **Statutes.** — In England and generally in our States, there are statutes more or less regulating various classes of voluntary associations; some making those of the particular sort *quasi* corporations, some providing a special manner of suing them, some, — but the provisions are so differing that even a general enumeration is not here desirable. The practitioner should look carefully, under this head, into the statutes of his own State; but, in a work like the present, any attempt to help him therein would result in more confusion than profit. Leaving out of view these statutes, —

§ 1156. **Partnerships by other Names.** — There are associations which, while not called partnerships, are such in law; for example, joint-stock companies,³ and there are others.⁴ The doctrines of this chapter do not apply to them.

§ 1157. **Members not bind Each Other.** — Mere membership,

¹ Ante, § 440, 1143, 1144.

² See the whole chapter, ante, § 438–460.

³ *Townsend v. Goewey*, 19 Wend. 424, 428; *Williams v. Bank of Michi-*

gan, 7 Wend. 539, 542; *Cross v. Jackson*, 5 Hill, N. Y. 478, 480; *In re Fry*, 4 Philad. 129.

⁴ *Cutler v. Thomas*, 25 Vt. 73; *Wells v. Gates*, 18 Barb. 554.

in an association of the sort we are now considering, gives the member no authority to bind either another member or the association at large by any contract.¹ But membership may, in a particular case, be an element which, added to other facts, will create such authority or a presumption thereof. Thus,—

§ 1158. **Illustrations.** — If persons associate to procure a charter for a bank, then, at a regular meeting not attended by all, those present appoint an agent to apply to the legislature for the charter, — a step necessarily contemplated in the very act of so associating, — whereupon the agent performs the contemplated service without protest from those who were not present, the latter may be holden jointly with the others to pay him.² But the mere unaided fact that a voluntary association appoints a committee, and the committee incurs a debt, will not charge a member who was not present at its appointment.³ Now,—

§ 1159. **Rule as to Liability.** — From the reason of the thing and from the adjudications, not attempting to enter largely into the facts of particular cases, we may derive the following. Where, from the articles of association, if such there are, from the act of the individual member at or before the making of a contract, from his subsequent acquiescence with full knowledge, from his appropriating to himself some benefit therefrom, or from any other fact, it appears either that his will originally concurred in the bargaining, or in the authorization of an agent who did it, or that afterward he voluntarily took therefrom a benefit out of which the law could create a promise, or estopped himself to deny his obligation, he will be holden; in other circumstances, he will not be.⁴ Thus,—

¹ *Todd v. Emly*, 7 M. & W. 427; s. c. after a new trial, 8 M. & W. 505, 510; *Fleming v. Hector*, 2 M. & W. 172; *Crum's Appeal*, 16 Smith, Pa. 474; *Downing v. Mann*, 3 E. D. Smith, 36.

² *Sproat v. Porter*, 9 Mass. 300. And see *Newell v. Borden*, 128 Mass. 31.

³ *Volger v. Ray*, 131 Mass. 439.

⁴ It is not in the nature of our juris-

prudence that a proposition so wide as this should be sustainable by a reference to any particular case. Ante, § 19, 184, note, 217, note, 369. The reader can consult the cases cited to the other sections; and, for further illustrations, *Abels v. McKeen*, 3 C. E. Green, 462; *Penfield v. Skinner*, 11 Vt. 296; *Cross v. Williams*, 7 H. & N. 675; *Austin v.*

§ 1160. **Employing.** — Officers or members of an unincorporate religious society are individually holden to pay a clergyman or other employee whom they personally hire.¹ So —

§ 1161. **Any Obligation.** — A member who votes for any expenditure, or otherwise personally concurs in any act of contracting, whether performed directly or through an agent, is responsible as a joint promisor with the rest.² Again, —

§ 1162. **Articles of Association.** — These, or any like agreement between the members, may authorize a particular officer, member, or third person to make contracts for the association; whereupon all will be bound by them when made.³ On the other hand, the nature of a bargaining may be of a sort to hold the members to the contracting third person, even contrary to such articles or agreement.⁴

§ 1163. **Form of Contract.** — One contracting in behalf of a voluntary association may, like any other agent,⁵ bind himself personally by the special words which he employs.⁶

§ 1164. *The Doctrine of this Chapter restated.*

Persons who, without an act of incorporation, enter into an association, lose thereby none of their powers to obligate themselves individually by contract. Moreover, like unassociated persons, they are not holden by contracts which others make in their names, except from prior authority or subsequent ratification. Still the authority may be given in any of the ways known to the law of agency. And the doctrines of ratification, estoppel, and law-created contracts apply to these association dealings, the same as to others. To add or repeat illustrations, in this place, would be superfluous.

Searing, 16 N. Y. 112; Bennett v. Wheeler, 12 La. An. 763; Barry v. Nuckolls, 2 Humph. 324; Lake v. Munford, 4 Sm. & M. 312; Wells v. Turner, 16 Md. 133.

¹ Thompson v. Garrison, 22 Kan. 765.

² Ray v. Powers, 134 Mass. 22; Robinson v. Robinson, 1 Fairf. 240; Fredendall v. Taylor, 23 Wis. 538; Dow v. Moore, 47 N. H. 419.

³ Cockerell v. Aucompte, 2 C. B. N. S. 440; Hall v. Thayer, 12 Met. 130; Tyrrell v. Washburn, 6 Allen, 466; Wells v. Gates, 18 Barb. 554.

⁴ Beaver v. McGrath, 14 Wright, Pa. 479; Dow v. Moore, 47 N. H. 419; Sullivan v. Campbell, 2 Hall, 271; Henry v. Jackson, 37 Vt. 431.

⁵ Ante, § 1077.

⁶ Ulam v. Boyd, 6 Norris, Pa. 477.

CHAPTER XLIV.

BLANKS IN THE WRITTEN CONTRACT AND FILLING THEM.

§ 1165, 1166. Introduction.

1167-1172. Specialties.

1173-1175. Simple Contracts.

1176. Doctrine of Chapter restated.

§ 1165. **Diversities.** — We have in the subject of this chapter another branch of the law of agency. It introduces us to some judicial differences; and, by all opinions, it includes something of the law of estoppel. Moreover, the rules are not alike in simple contracts and specialties.¹ Hence, —

§ 1166. **How Chapter divided.** — We shall consider this subject as to, I. Specialties; II. Simple Contracts.

I. *Specialties.*

§ 1167. **Unfilled Blanks.** — A specialty, otherwise duly executed and delivered, is good in spite of unfilled blanks in it, if interpretation² can ascertain and make definite its meaning;³ if not, it is void.⁴ Thus, a bond conditioned for the payment of board is not invalidated by a blank for the sum per week; since it holds the party to pay a reasonable sum.⁵

¹ In re Tahiti Cotton Co. Law Rep. 17 Eq. 273.

² Ante, § 383, 390.

³ Eagleton v. Gutteridge, 11 M. & W. 465 (explained in Burns v. Lynde, 6 Allen, 305, 310); Whiting v. Daniel, 1 Hen. & Munf. 390; HARRY v. Wall, 1 B. & Ald. 103; Sellin v. Price, Law Rep. 2 Ex. 189; Devin v. Himer, 29 Iowa, 297; Vose v. Dolan, 108 Mass.

155. In these cases, the filling of the blank with what interpretation puts in does not vitiate the instrument. *Ib.*; ante, § 751, 755.

⁴ Consols Ins. Assoc. v. Newall, 3 Fost. & F. 130; Hibblewhite v. McMorine, 6 M. & W. 200, 4 Jur. 769.

⁵ Lunatic Asylum v. Douglas, 77 Misso. 647.

But any specialty wherein the name of the obligee or grantee is in blank, with nothing in any part of it from which interpretation can supply the name, is void.¹ So likewise a bond for the payment of — dollars is of no effect, being simply an undertaking to pay nothing; and oral evidence² cannot change this.³ Yet if one obligor subscribes a sealed instrument in blank, then another obligor fills the blank and executes it, the latter is holden.⁴ Hence the signing, the sealing, the delivering, and the receiving of a specialty which is void because of its blanks, are severally void acts. Now, —

§ 1168. **Authority to fill Blanks.** — It being established doctrine that an authority to execute a sealed instrument in the party's absence must be under seal,⁵ and it being an axiomatic truth that the whole of a thing comprehends each particular part, the consequence necessarily is, that, in the absence of the party, no other person can fill such a blank in a specialty as renders it void, except under a sealed authorization.⁶ And so are the English and a large proportion of the American adjudications.⁷ For example, a fully executed deed, with the name of the obligee or grantee in blank, is not validated by an agent's filling the blank under an authorization not sealed.⁸ Still there are American cases which, while not rejecting the entire doctrine requiring the authority to be under seal, deny this part of it; and, in the language of a learned judge, "hold, that parol authority is sufficient to authorize the fill-

¹ *Preston v. Hull*, 23 Grat. 600; *Wunderlin v. Cadogan*, 50 Cal. 613; *Barden v. Southerland*, 70 N. C. 528; *Viser v. Rice*, 33 Texas, 139; *Chase v. Palmer*, 29 Ill. 306; *Adamson v. Hartman*, 40 Ark. 58; *Whitaker v. Miller*, 83 Ill. 381. See *Bishop v. Morgan*, 11 Mod. 275.

² *Ante*, § 169.

³ *Copeland v. Cunningham*, 63 Ala. 394, 397; *Canal, &c. Railroad v. Armstrong*, 27 La. An. 433.

⁴ *Penn v. Hamlett*, 27 Grat. 337; *Furnas v. Durgin*, 119 Mass. 500, 509.

⁵ *Ante*, § 1045.

⁶ "If such an act can be done under a parol agreement, in the absence of

the grantor, its effect must be to overthrow the doctrine that an authority to make a deed must be given by deed." *Chapman, J. in Burns v. Lynde*, 6 Allen, 305, 311.

⁷ *Burns v. Lynde*, *supra*, where the principal English and many American authorities are collected and considered; *Hibblewhite v. McMorine*, 6 M. & W. 200; *Davidson v. Cooper*, 11 M. & W. 778, 793; *Powell v. Duff*, 3 Camp. 181; *Wunderlin v. Cadogan*, 50 Cal. 613; *Preston v. Hull*, 23 Grat. 600; *Adamson v. Hartman*, 40 Ark. 58.

⁸ *Preston v. Hull*, 23 Grat. 600; *Penn v. Hamlett*, 27 Grat. 337, 342; *Basford v. Pearson*, 9 Allen, 387.

ing of a blank in a sealed instrument, and that such authority may be given in any way by which it might be given in case of an unsealed instrument.”¹ Not all the adjudications on this side of the question so squarely ignore the reasoning necessary, as we have just seen, to be confronted to reach this conclusion; but some of them give a specially wide scope to another doctrine which, within what are deemed its just limits, all accept; namely, —

§ 1169. **Estoppel.** — Under various actual and supposable facts, the filling of blanks in a specialty without sealed authorization will be within the law of equitable estoppel, explained in a preceding chapter.² As this estoppel can take effect only where there are in combination a misrepresentation contrary to duty,³ an evil purpose in the party to be estopped,⁴ and a reliance on the falsehood by the other party to his injury,⁵ there can be no estoppel, in the cases now under consideration, where the one availing himself of the instrument knew that the filling of the blank was done by an

¹ Mitchell, J. in *The State v. Young*, 23 Minn. 551, 556, 557. He refers to *Drury v. Foster*, 2 Wal. 24; *South Berwick v. Huntress*, 53 Maine, 89; *Woolley v. Constant*, 4 Johns. 54; *Ex parte Kerwin*, 8 Cow. 118; *Wiley v. Moor*, 17 S. & R. 438; *Field v. Stagg*, 52 Misso. 534; *Vliet v. Camp*, 13 Wis. 198; *Smith v. Crooker*, 5 Mass. 538. Doubtless most of these cases are pertinent to the proposition to which the learned judge here cites them. In *Burns v. Lynde*, 6 Allen, 305, 308, decided by the Massachusetts court subsequently to *Smith v. Crooker*, the direct opposite of this Minnesota doctrine was, on careful consideration, adjudged. And the court observed of *Smith v. Crooker*, that “a treasurer had made a bond in which the name of a surety had been left blank; and after delivery it was filled up. The bond was held good, on the authority of several ancient cases, the fact being specially noticed that the *alteration was immaterial*.” See ante, § 1167. Though this case cannot be counted on the side to which

it is thus cited, there are doubtless other American ones, besides the above, which can be. The practitioner will carefully consult, on this question, the decisions of his own State, and they will be before him; so I shall not multiply these references. See, on the one side or the other, *Viser v. Rice*, 33 Texas, 139; *Cross v. State Bank*, 5 Pike, 525; *Pennsylvania Ins. Co. v. Dovey*, 14 Smith, Pa. 260; *Davenport v. Sleight*, 2 Dev. & Bat. 381; *Byers v. McClanahan*, 6 Gill & J. 250; *McClain v. McClain*, 52 Iowa, 272; *United States v. Nelson*, 2 Brock. 64; *Gibbs v. Frost*, 4 Ala. 720, 728. I add some Illinois cases, a part of which proceeded largely on the doctrine of estoppel; thus, — *People v. Organ*, 27 Ill. 27, 29, afterward overruled; *Wilson v. South Park*, 70 Ill. 46; *McNab v. Young*, 81 Ill. 11; *Whitaker v. Miller*, 83 Ill. 381; *Wade v. Bunn*, 84 Ill. 117; *Chicago v. Gage*, 95 Ill. 593.

² Ante, § 264 et seq.

³ Ante, § 288 et seq.

⁴ Ante, § 292 et seq.

⁵ Ante, § 296.

authority not under seal.¹ In like manner, after the blank has been filled without a sealed authority, a mere unsealed declaration by the principal, approving of the agent's act in filling it, will not amount to the required estoppel.² But, not to descend to the particulars of the somewhat conflicting opinions and adjudications, the estoppel takes place wherever the principal — some would say, by his gross carelessness, though he does not mean to defraud,³ yet, by all opinions, fraudulently — so conducts as to create in the one accepting the specialty the belief that it has been duly executed, satisfying the law (both parties being conclusively presumed to know the law⁴), under circumstances which will render the transaction a fraud on him, to his injury, if the truth of the case is permitted to be shown. So, for the protection of the otherwise injured party, the one who has misled him is estopped to set up the real facts.⁵ Now, aside from this doctrine of estoppel, —

§ 1170. **When certainly Good.** — After a specialty is signed and sealed, but not delivered, if there are blanks therein for the names of parties, sums, description of the premises, or the like, they may be filled by any person in the presence of the maker, with his authority, though only verbal,⁶ — or, in his absence, with his authority under seal,⁷ — and, on its delivery, it will be equally good as if they had been filled before sealing.⁸ And, within this doctrine, an agent authorized under seal, or the party himself, may fill a blank and redeliver the instrument, after it has been delivered.⁹ But, in the latter case, a redelivery is necessary.¹⁰ Again, as the mere

¹ Compare with *New York Mut. Life Ins. Co. v. Wilcox*, 8 Bis. 197; *Preston v. Hull*, 23 Grat. 600, 608.

² *Davenport v. Sleight*, 2 Dev. & Bat. 381.

³ *Swan v. North British Australasian Co.* 2 H. & C. 175, 8 Jur. n. s. 940. And see *Halifax Union v. Wheelwright*, Law Rep. 10 Exch. 183; *Caulkins v. Whisler*, 29 Iowa, 495; *Baxendale v. Bennett*, 3 Q. B. D. 525; ante, § 294.

⁴ Ante, § 378, 462, 463.

⁵ See, at large, the foregoing chapter

on Estoppel; and, in connection with it, *Chicago v. Gage*, 95 Ill. 593; *Rhode v. Louthain*, 8 Blackf. 413; *Hill v. Scales*, 7 Yerg. 410; *Byers v. McClanahan*, 6 Gill & J. 250; *Owen v. Perry*, 25 Iowa, 412; *Pence v. Arbuckle*, 22 Minn. 417; *Stowe v. United States*, 19 Wal. 13.

⁶ Ante, § 345, 775, 1047.

⁷ Ante, § 1045.

⁸ *Parry v. Dale*, Yelv. 95, 96, and Metcalf's note.

⁹ See *Gibbs v. Frost*, 4 Ala. 720.

¹⁰ *McNutt v. McMahan*, 1 Head, 98;

date is not an essential part,¹ plainly a blank for it may at any time be filled, if correctly done, in the absence of the maker, by parol authority.² Again, —

§ 1171. **Where Sealing not Essential — Some Effect.** — A blank in a sealed instrument, of a sort to be effectual in law without a seal, may be filled under parol authority; thereby reducing its grade to a simple contract.³ And, in various circumstances, within principles already explained,⁴ the filling of a blank under such authority will merely transform what was meant for a specialty to a simple contract in writing; the seal being deemed an excess of the agent's power, and void to this extent, yet no further,⁵ — concerning which, nothing need be added to what has gone before.

§ 1172. **Authority withdrawn.** — After the authority to fill a blank has terminated by the principal's death or otherwise, it cannot be exercised unless coupled with an interest.⁶

II. *Simple Contracts.*

§ 1173. **Form of Authority.** — Since any form of authorization, oral, written, or implied, will qualify the agent to bind his principal by a simple contract,⁷ it will consequently⁸ enable him validly to fill a blank. In most of the litigated cases the power is implied. Thus, —

§ 1174. **Delivered in Blank.** — Where one, to charge himself, signs a writing, in which is a blank evidently meant to be filled, and delivers it to a third person, or in general even to the party, he thereby impliedly transmits an authority to

Burns v. Lynde, 6 Allen, 305, 310;
Tupper v. Foulkes, 9 C. B. N. s. 797,
7 Jur. N. s. 709.

¹ Ante, § 114, 178, 543.

² See Whiting v. Daniel, 1 Hen. & Munf. 390; Bell v. Quick, 1 Green, N. J. 312; Fournier v. Cyr, 64 Maine, 32; Commonwealth Bank v. McChord, 4 Dana, 191; Keen v. Monroe, 75 Va. 424; Cockell v. Gray, 6 Moore, 483.

³ Ante, § 773; Adams v. Power, 52 Missis. 828.

⁴ Ante, § 130-137, 393, 394, 772-774, 1046.

⁵ McCown v. Wheeler, 20 Texas, 372; Viser v. Rice, 33 Texas, 139; Crozier v. Carr, 11 Texas, 376; Squire v. Whitton, 1 H. L. Cas. 333, 12 Jur. 125.

⁶ Ante, § 1051-1055; Canal, &c. Railroad v. Armstrong, 27 La. An. 433; Threadgill v. Butler, 60 Texas, 599. And see Carter v. White, 25 Ch. D. 666.

⁷ Ante, § 1043, 1046, 1049.

⁸ Ante, § 1168.

the individual receiving it to fill the blank.¹ Though the one thus authorized violates his instructions, or otherwise abuses the power which he knows was meant to be conferred on him, if in filling the blank he keeps within what may be deemed fairly implied from the transaction itself, he binds the maker to another who becomes the holder of the instrument in good faith.² It is otherwise where the words written in are —

§ 1175. **Beyond what is Implied.** — The holder of a promissory note, indorsed in blank, cannot validly change the contract implied from the indorsement by writing over the indorser's name a guaranty.³ And the owner of a blank bill of exchange makes it void if he converts it into a promissory note.⁴ So, where parties had agreed upon the terms of a contract, and one of them wrote upon a paper his name, authorizing the other to complete the instrument accordingly, and the latter inserted different terms, the former was held not to be bound.⁵ There are circumstances wherein this sort of question is attended with a good deal of difficulty.⁶

§ 1176. *The Doctrine of this Chapter restated.*

A blank in a written contract does not impair its validity if, by the aid of interpretation, a sufficient and duly precise meaning can be made out. Otherwise, so long as the blank remains unfilled, the instrument is void. Hence, to fill the latter sort of blank, the parties, whether acting personally or

¹ In re Tahiti Cotton Co. Law Rep. 17 Eq. 273; Spitler v. James, 32 Ind. 202; Commonwealth Bank v. McChord, 4 Dana, 191; Wiley v. Moor, 17 S. & R. 438; Smith v. Crooker, 5 Mass. 538; Duncan v. Hodges, 4 McCord, 239; Jordan v. Neilson, 2 Wash. Va. 164; Boardman v. Gore, 1 Stew. 517; South Berwick v. Huntress, 53 Maine, 89; Jewell v. Rock River Paper Co. 101 Ill. 57; Hepler v. Mount Carmel Sav. Bank, 1 Out. Pa. 420.

² Waldron v. Young, 9 Heisk. 777; Blackwell v. Ketcham, 53 Ind. 184;

Frazier v. Gains, 2 Baxter, 92; Russel v. Langstaffe, 2 Doug. 514; Edie v. East India Co. 2 Bur. 1216, 1 W. Bl. 295.

³ Belden v. Hann, 61 Iowa, 42.

⁴ Luellen v. Hare, 32 Ind. 211. And see Rainbolt v. Eddy, 34 Iowa, 440; Arrington v. Burton, 19 Ala. 114.

⁵ Rounsavell v. Pease, 45 Wis. 506. See Blackwell v. Ketcham, 53 Ind. 184.

⁶ See, for example, Knoxville Bank v. Clark, 51 Iowa, 264; Cronkhite v. Nebeker, 81 Ind. 319; Baxendale v. Bennett, 3 Q. B. D. 525.

by agent, must go through the same formalities in substance as though they were executing an entirely new writing. If the new writing, made under the like circumstances, would be valid, so will be the filling of the blank; otherwise it will be invalid. And if, under the like circumstances, a new writing meant for a specialty will operate as a simple contract, so will the void old when the blank is filled. A blank in a written simple contract may be filled under any sort of express or implied authorization. To fill one in a specialty, in the absence of the maker, requires, by the better opinion, an authority under seal.

CHAPTER XLV.

ASSIGNORS AND ASSIGNEES.

§ 1177, 1178. Introduction.

1179–1183. Non-negotiable *Choses in Action*.

1184–1189. Negotiable *Choses in Action*.

1190–1192. Covenants running with Land.

1193–1195. The Doctrine in Equity.

1196–1198. By Operation of Law.

1199. Doctrine of Chapter restated.

§ 1177. **What for this Chapter.** — The subject of assignments is of great magnitude. The purpose here is, not to unfold it at large, but to present such views as will enable the reader to comprehend the relations of parties making and taking assignments, and something of their methods. There are, in this subject, distinctions creating natural divisions; following which, —

§ 1178. **How Chapter divided.** — We shall consider assignments as to, I. Non-negotiable *Choses in Action*; II. Negotiable *Choses in Action*; III. Covenants running with Land; IV. The Doctrine in Equity; V. By Operation of Law.

I. *Non-negotiable Choses in Action.*

§ 1179. **Whether Assignee sue.** — The common law, originating in conditions not all of which remain unchanged, not only made champerty and maintenance indictable,¹ but, to prevent the rich and powerful buying up and prosecuting claims against the weak to their oppression,² prohibited the assignee (not now speaking of the exceptions to be mentioned

¹ 2 Bishop Crim. Law, § 121 et seq.

² Co. Lit. 214 a; 2 Bl. Com. 442.

in the next sub-title) to maintain in his own name an action on any promise or other liability¹ originally running to his assignor. And such, with us, is the common-law doctrine to the present day.² It extends so far that, even where the assigned promise is to pay a sum of money to the assigning promisee or *bearer*, or to his *order*, or where by any other words the intent appears however clearly to make the instrument assignable, still it cannot be so transferred as to empower the holder to sue on it in his own name;³ for parties cannot, by their agreement, change a rule of law.⁴ This question concerns simply the form of action, — namely, who shall be the ostensible plaintiff, — and, by late legislation, both in many of our States and in England, the assignee may be the plaintiff of record as well as in fact. Returning to the common-law rules, —

§ 1180. **Rights of Assignee.** — Whatever may have been the further doctrine in very early times, we find that, at a period as far back as we need trace the question to, the foregoing common-law rule did not impair the substantial rights of the assignee. For, said Holt, C. J., though a bond, for example, “be not assignable in point of interest,” the assignment “is a covenant that the assignee shall receive the money to his own use.”⁵ By reason whereof such assignee can maintain his action in the assignor’s name; and the court will not suffer it to be dismissed, or the claim to be settled *in pais*, or anything else to be done by the assignor to the assignee’s prejudice.⁶ But, in order to prevent a release from, or payment to, the assignor operating to cut off the right of the assignee, he must

¹ *Dunklin v. Wilkins*, 5 Ala. 199; *Davis v. Herndon*, 39 Miss. 484; *Gardner v. Adams*, 12 Wend. 297.

² *Hay v. Green*, 12 Cush. 282; *Usher v. D’Wolfe*, 13 Mass. 290; *Orr v. Amory*, 11 Mass. 25; *Robertson v. Reed*, 11 Wright, Pa. 115; *Hunt v. Mann*, 132 Mass. 53, 55; *Greenby v. Wilcocks*, 2 Johns. 1; *Read v. Young*, 1 D. Chip. 244; *Boston Ice Co. v. Potter*, 123 Mass. 28.

³ *Coolidge v. Ruggles*, 15 Mass. 387; *Clark v. King*, 2 Mass. 524; *People v.*

Gray, 23 Cal. 125; *Little v. Phenix Bank*, 7 Hill, N. Y. 359; *Jones v. Carter*, 8 Q. B. 134; *Skinner v. Somes*, 14 Mass. 107; *Legro v. Staples*, 16 Maine, 252; *Weidler v. Kauffman*, 14 Ohio, 455.

⁴ *Crouch v. Credit Foncier*, Law Rep. 8 Q. B. 374.

⁵ *Caister v. Eccles*, 1 Ld. Raym. 683.

⁶ *Legh v. Legh*, 1 B. & P. 447; *Fay v. Guynon*, 131 Mass. 31, 34; *Halloran v. Whitcomb*, 43 Vt. 306; *McWilliams v. Webb*, 32 Iowa, 577.

give to the indebted party notice of the assignment, or the latter must in some way know it; or, by some opinions (a question not viewed in the same way by all courts), it is sufficient if he is put on his inquiry.¹ What the assignee takes is simply his assignor's rights; and, down to the period of assignment and notice, not further, the defendant can rely on the same matters of defence as though no assignment had been made.²

§ 1181. **Debtor Promising.** — If, after assignment and notice, the debtor expressly promises the assignee³ to make payment to him, the latter, even under the common-law rules, can maintain a suit on the promise in his own name.⁴

§ 1182. **What Assignable.** — Not every sort of contract is in its nature assignable. For example, an agreement involving a personal trust in the party, or to be carried out by his personal skill, cannot be so assigned as to compel the other party to accept performance by the assignee, and pay him therefor.⁵ A familiar illustration whereof is, that a master cannot validly assign over his apprentice.⁶ But the right to perform an agreement, and receive the money to be earned

¹ *Tibbits v. George*, 5 A. & E. 107; *Riley v. Taber*, 9 Gray, 372, 373; *Upton v. Moore*, 44 Vt. 552; *Barron v. Porter*, 44 Vt. 587; *Heermans v. Ellsworth*, 64 N. Y. 159; *Jones v. New York*, 90 N. Y. 387; *Comstock v. Farnum*, 2 Mass. 96; *Dale v. Kimpton*, 46 Vt. 76; *Anderson v. Van Alen*, 12 Johns. 343; *Kellogg v. Krauser*, 14 S. & R. 137; *Davenport v. Woodbridge*, 8 Greenl. 17; *Bean v. Simpson*, 16 Maine, 49.

² *Clute v. Robison*, 2 Johns. 595; *Willis v. Twambly*, 13 Mass. 204, 206; *Webster v. Wise*, 1 Paige, 319; *Jack v. Davis*, 29 Ga. 219; *Murray v. Gouverneur*, 2 Johns. Cas. 438; *Turton v. Benson*, 1 P. Wms. 496, 497; *Bush v. Lathrop*, 22 N. Y. 535; *Wetter v. Kiley*, 14 Norris, Pa. 461; *Shade v. Creviston*, 93 Ind. 591; *Boardman v. Hayne*, 29 Iowa, 339; *Martin v. Richardson*, 68 N. C. 255; *Stevens v. Johnson*, 28 Minn. 172; *Mangles v. Dixon*, 3 H. L. Cas. 702.

³ *Price v. Easton*, 4 B. & Ad. 433.

⁴ *Jessel v. Williamsburgh Ins. Co.* 3 Hill, N. Y. 88; *Crocker v. Whitney*, 10 Mass. 316, 319; *Innes v. Dunlop*, 8 T. R. 595; *Compton v. Jones*, 4 Cow. 13; *Fenner v. Meares*, 2 W. Bl. 1269; *Surtees v. Hubbard*, 4 Esp. 203.

⁵ *Robson v. Drummond*, 2 B. & Ad. 303; *The Lizzie Merry*, 10 Ben. 140; *Bethlehem v. Annis*, 40 N. H. 34; *Munsell v. Temple*, 3 Gilman, 93; *Joslyn v. Parlin*, 54 Vt. 670; *Lansden v. McCarthy*, 45 Misso. 106. And see ante, § 600, 862, 1067.

⁶ *Castor v. Aicles*, 1 Salk. 68; *Conventry v. Woodhall*, Hob. 134 a, 135; *Hern v. Dryden*, 11 Mod. 272; *Davis v. Coburn*, 8 Mass. 299; *Handy v. Brown*, 1 Cranch C. C. 610; *Stringfield v. Heiskell*, 2 Yerg. 546; *Nickerson v. Howard*, 19 Johns. 113. And see ante, § 601.

thereby, is, when not within this principle of personal confidence, assignable.¹ Of this, a common illustration is a building contract.² And, in general terms, a perfected claim to anything, whether money or goods, may be so assigned as to vest in the assignee the equitable interest, or in some of the States the legal.³ There are other distinctions. But to carry these illustrations further would be foreign to the purpose of this chapter.

§ 1183. **Government Assignor or Assignee.**—By the English common law, an assignment of a *chose in action* to or from the king entitles the assignee, whether king or subject, to sue it in his own name.⁴ The reason of this does not distinctly appear; but we may assume it to be because the crown cannot commit the crime of maintenance, or the oppressions out of which the rule as between subject and subject grew.⁵ And the same doctrine, that an assignment to or from the government carries to the assignee the right of action in his own name, is believed to prevail with us.⁶ There is the same reason for it here as in England, and it harmonizes with the tendencies of our modern law.

II. *Negotiable Choses in Action.*

§ 1184. **Bills and Notes.**—By the usage of merchants, whereof, because of its universality, the courts took judicial cognizance, rendering it a part of the common law,⁷ bills of

¹ Devlin v. New York, 63 N. Y. 8; Tugman v. National Steamship Co. 76 N. Y. 207.

² Ante, § 603, 861; Devlin v. New York, supra; Kellogg Bridge v. Hamilton, 110 U. S. 108.

³ Taylor v. Galland, 3 Greene, Iowa, 17; Gray v. Garrison, 9 Cal. 325; Burkett v. Moses, 11 Rich. 432; Bull v. Faulkner, 2 De G. & S. 772, 13 Jur. 93; Pier v. George, 86 N. Y. 613.

⁴ Ante, § 990; Bac. Abr. Prerogative, E, 3; Breverton's Case, 1 Dy. 30 b; Miles v. Williams, 1 P. Wms. 249, 252, 353, 10 Mod. 243, 245; s. c. nom.

Myles v. Williams, Gilb. Cas. 318, 321; Lambert v. Taylor, 4 B. & C. 138, 150. And see Bowes v. Paulet, Cro. Eliz. 653; Breadman v. Coales, Hob. 253; Stat. 7 Jac. 1, c. 15.

⁵ Ante, § 1179.

⁶ United States v. Buford, 3 Pet. 12, 30.

⁷ Ante, § 445; Williams v. Williams, Carth. 269. The drawing of a bill made the party a merchant within the custom. Hodges v. Steward, 1 Salk. 125; Cramlington v. Evans, Holt, 108, 111.

exchange were from early times adjudged to be negotiable when their terms were so,¹ constituting an exception to the doctrine of the last sub-title.² And the statute of 3 & 4 Anne, c. 9, put promissory notes on the footing of "inland bills of exchange."³ This statute, as to notes, and the prior common law as to bills, are unwritten law with us.⁴

§ 1185. **Scrip Certificates — Modern Usage,** — whether it has so ripened as to become a part of the common law or not,⁵ may, and it sometimes does, render a particular class of instruments — for example, scrip certificates — negotiable, in the same way in which bills of exchange originally became so.⁶ Again, —

§ 1186. **Government Bonds,** — whether of our own or a foreign government, are in law negotiable if such is their form;⁷ otherwise, like bills and notes lacking the negotiable words, they are not.⁸ Usage undoubtedly aids this conclusion; still, in reason, as this case does not furnish opportunities for the rich to oppress the poor,⁹ but it more nearly resembles assignments to and from the government,¹⁰ the government bonds ought to have the effect which their terms express. Even, —

§ 1187. **Corporation Bonds — Coupons.** — By the nearly unanimous modern opinion, the bonds of a municipal, railroad, or other like corporation, payable on their face to the "bearer" or "holder," or to one named or his "order" or "assigns," and intended for miscellaneous circulation, are, though under seal, and whether coupons are attached or not, negotiable.¹¹ And it is the same with their coupons when

¹ Ante, § 1179.

² *Grant v. Vaughan*, 3 Bur. 1516, 1522; *Ormston's Case*, 10 Mod. 286.

³ *Cutting v. Williams*, 7 Mod. 155 and note; *Burchell v. Slocock*, 2 Ld. Raym. 1545.

⁴ *Jones v. Fales*, 4 Mass. 245, 254; *Dunn v. Adams*, 1 Ala. 527; *Yingling v. Kohlhas*, 18 Md. 148; 3 Kent Com. 72.

⁵ Ante, § 444-446.

⁶ *Goodwin v. Robarts*, Law Rep. 10 Ex. 76, 337, 1 Ap. Cas. 476; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

⁷ *Gorgier v. Mieville*, 3 B. & C. 45;

Attorney-General v. Bouwens, 4 M. & W. 171; *Brandao v. Barnett*, 3 C. B. 519; *Wookey v. Pole*, 4 B. & Ald. 1; *Texas v. White*, 7 Wal. 700; *Illinois v. Delafield*, 8 Paige, 527; s. c. in error *Delafield v. Illinois*, 2 Hill, N. Y. 159, 177; *Seybel v. National Cur. Bank*, 54 N. Y. 288.

⁸ *Glyn v. Baker*, 13 East, 509, explained in *Gorgier v. Mieville*, supra.

⁹ Ante, § 1179.

¹⁰ Ante, § 1183.

¹¹ *Brainerd v. New York, &c. Railroad*, 25 N. Y. 496; *Griffith v. Bur-*

detached.¹ There is here nothing violative of that policy of the common law which forbade maintenance and its kindred oppressions; and, on the other hand, the negotiability of these instruments accords alike with their purpose and with modern business usage.

§ 1188. **Statutes.** — varying in our States, have more or less extended the foregoing doctrines.

§ 1189. **Effect of Negotiable.** — The meaning of the term “negotiable” is uniform, not varying with the sort of instrument. It implies, among other things, that there must be words of negotiability;² then, if they promise payment to the “bearer,” or to a person’s “order” and he indorses the instrument in blank, it may be transferred to successive owners indefinitely by mere delivery.³ The holder, though it passed to him through many hands, is entitled to sue it in his own name; and, if he received it before it was due, in good faith, for value, and without notice of any defences, he can ordinarily collect it in spite of anything which the maker had to offer against the original holder.⁴ But when payment has become overdue, a purchaser of the instrument takes it subject to all equities.⁵ A minuter exposition would not accord with the plan of this chapter.

III. *Covenants running with Land.*

§ 1190. **Real Estate Law.** — The subject of covenants running with the land constitutes a considerable title in the law

den, 35 Iowa, 138; *Otis v. Cullum*, 92 U. S. 447; *Bank of Rome v. Rome*, 19 N. Y. 20; *Mercer v. Hackett*, 1 Wal. 83; *Gelpcke v. Dubuque*, 1 Wal. 175; *Meyer v. Muscatine*, 1 Wal. 384; *Morris Canal, &c. Co. v. Lewis*, 1 Beas. 323; *New Albany, &c. Plank Road v. Smith*, 23 Ind. 353. But see *Diamond v. Lawrence*, 1 Wright, Pa. 353. And see *Maddox v. Graham*, 2 Met. Ky. 56.

¹ *Thomson v. Lee*, 3 Wal. 327; *Murray v. Lardner*, 2 Wal. 110; *Kennard v. Cass*, 3 Dil. 147; *Haven v. Grand Junction, &c. Co.* 109 Mass. 88,

96; *Beaver v. Armstrong*, 8 Wright, Pa. 63; *Augusta Bank v. Augusta*, 49 Maine, 507.

² Explained ante, § 1186.

³ 3 Kent Com. 77; *Fairly v. McLean*, 11 Ire. 158; *Bank of United States v. Macalester*, 9 Barr, 475; *Beekman v. Wilson*, 9 Met. 434.

⁴ 3 Kent Com. 77-79; *Birdsall v. Russell*, 29 N. Y. 220; *Swall v. Clarke*, 51 Cal. 227; *Continental Bank v. Townsend*, 87 N. Y. 8; *Myers v. Hazard*, 4 McCrary, 94.

⁵ *Texas v. White*, 7 Wal. 700.

of real estate. It is introduced here simply to render the reader's view of the relations of the parties to assignments more full, but anything like a discussion of it would be undesirable.

§ 1191. **What.** — These covenants are commonly found in deeds of conveyance, leases, and the like. And there are, of this sort, implied covenants as well as express.¹ For a covenant to run with the land, it must concern the land itself, not merely the individual owner in a matter relating thereto; and there must be what is sometimes termed a certain privity of estate. One for the renewal of a lease² is such; so is a continuing one concerning the title; and there are many others.³ A mere personal covenant, of this general nature, is termed a covenant in gross. To distinguish between the two is a matter often nice and difficult.⁴ A covenant "broken before the land passes" from the covenantee is in gross, or a *chose in action*.⁵ In order to run with the land, it does not as of course require the word "assigns," "heirs," or any other of like meaning; yet, in various cases, such an expression will aid the conclusion that the covenant runs with the land.⁶

§ 1192. **How assign.** — A conveyance of the land constitutes an assignment of this sort of covenant; transmitting to the grantee the burden or right, so that a suit at law on the covenant may be maintained against or by him.⁷

¹ 4 Kent Com. 473.

⁵ 4 Kent Com. 473; *Ladd v. Noyes*,

² *Leppla v. Mackey*, 31 Minn. 75; *In re Adams*, 24 Ch. D. 199.

137 Mass. 151.

³ 4 Kent Com. 109, 473; *Austerberry v. Oldham*, 29 Ch. D. 750; *Scott v. McMillan*, 76 N. Y. 141; *Cole v. Hughes*, 54 N. Y. 444; *Jourdain v. Wilson*, 4 B. & Ald. 266; *Miller v. Noonan*, 12 Misso. Ap. 370; *Hurd v. Curtis*, 19 Pick. 459; *Langley v. Chapin*, 134 Mass. 82; *Hartung v. Witte*, 59 Wis. 285; *Callan v. McDaniel*, 72 Ala. 96; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600.

⁶ *Spencer's Case*, 5 Co. 16 a; *Hart v. Lyon*, 90 N. Y. 663; *Tatem v. Chaplin*, 2 H. Bl. 133; *Martyn v. Clue*, 18 Q. B. 661; *Wilkinson v. Rogers*, 10 Jur. n. s. 5; *Taite v. Gosling*, 11 Ch. D. 273; *Renals v. Cowlshaw*, 11 Ch. D. 866.

⁷ *Chandler v. Brown*, 59 N. H. 370; *Georgia Southern Railroad v. Reeves*, 64 Ga. 492; *Roche v. Ullman*, 104 Ill. 11; *Cole v. Kimball*, 52 Vt. 639; *Hardman v. Child*, 28 Ch. D. 712; *Betz v. Bryan*, 39 Ohio State, 320.

⁴ *Hardman v. Child*, 28 Ch. D. 712, 717.

IV. *The Doctrine in Equity.*

§ 1193. **How sue.** — The assignee of a *chose in action*, suing thereon in the equity tribunals, may, in disregard of the rule of the common-law courts stated in our first sub-title,¹ proceed in his own name; though, in some circumstances, owing to a real or supposed interest² in the assignor, he must make him a co-plaintiff.³ For it is the course in equity, that the party in interest brings suit in his own name.⁴

§ 1194. **Other Distinctions.** — There are, in connection with assignments, other differences between the equity and common-law rules. For example, at law, a creditor cannot without the debtor's consent assign a part of his claim; because it is the right of the latter, if he chooses, to discharge his debt in full and at once, not in parcels.⁵ But the equity tribunals, with their flexible proceedings, manage to sustain such an assignment.⁶ And, where a note is owned by two, the assignment by one, of his share, is good in equity.⁷ But —

§ 1195. **Not for this Place.** — It would not accord with the purpose of this chapter to carry out these explanations into their numerous details.

V. *By Operation of Law.*

§ 1196. **In General.** — In various places in the foregoing pages, we have had occasion to see that there is a wide difference between a thing done by the law and by the parties.⁸

¹ Ante, § 1179.

² *Russell v. Clark*, 7 Cranch, 69; *Mechanics Bank v. Seton*, 1 Pet. 299; *Story v. Livingston*, 13 Pet. 359, 375.

³ *Currier v. Howard*, 14 Gray, 511; *Hodges v. Saunders*, 17 Pick. 470; *Mason v. York, &c. Railroad*, 52 Maine, 82.

⁴ *Frye v. Bank of Illinois*, 5 Gilman, 332.

⁵ *Beardslee v. Morgner*, 73 Misso. 22. A check on a bank, operating as an assignment of the sum for which it is

drawn, constitutes, by the usages of trade, an exception to this rule. *Taylor v. Taylor*, 78 Ky. 470. And see *Coates v. Preston*, 105 Ill. 470.

⁶ *National Exch. Bank v. McLoon*, 73 Maine, 498; *Canty v. Latterner*, 31 Minn. 239.

⁷ *Fordyce v. Nelson*, 91 Ind. 447.

⁸ For example, ante, § 98, 99, 197–203, 441, 556, 595, 596, 793, 806, 867–877, 887, 906, 918, 967.

Therefore assignments made by the law have their own rules, and are not as of course governed by those hitherto set down in this chapter. Thus, —

§ 1197. **Bankruptcy.** — An assignment in bankruptcy gives, it is believed, on the general principles of the law, authority to the assignee, in whom it vests the assets, to collect the *choses in action* by suit in his own name,¹ — a question which is in the main settled by statutes. And, on principle, as the assignee, while taking the estate from the debtor, represents the creditors, he should be entitled to recover back what the former had conveyed away in fraud of the latter. But, in other respects, a defence good against the debtor should be equally available against him. Herein his position differs from that of the other assignees mentioned in this chapter. To unfold these views on the authorities, involving complications of statutory law and adjudications, would conduct the reader further into a tangle than is deemed necessary at this place.² Again, —

§ 1198. **Executors and Administrators** — are assignees by operation of law. The goods and *choses in action* of the deceased are vested in them.³ It follows, therefore, that they may sue and be sued, in their own names (whether in their representative capacity or as individuals we are not now inquiring), for whatever concerns the estate of the deceased.⁴ And, if it is not insolvent, they stand, both as to actions and defences, simply in his shoes.⁵ But, if it is insolvent, they, when plaintiffs, so far represent creditors as to be entitled to recover also on their behalf.⁶

¹ 3 Pars. Con. 469.

² Consult the next section; also ante, § 673; Day v. Cooley, 118 Mass. 524, 527.

³ Jewett v. Smith, 12 Mass. 309; Beecher v. Buckingham, 18 Conn. 110; Snodgrass v. Cabiness, 15 Ala. 160; Shirley v. Healds, 34 N. H. 407; Neale v. Hagthorp, 3 Bland, 551; Tharpe v. Stallwood, 6 Scott N. R. 715, 7 Jur. 492; Poag v. Miller, Dudley, S. C. 11.

⁴ Ib.; Carlisle v. Burley, 3 Greenl. 250; Potter v. Van Vranken, 36 N. Y. 619; Eisenbise v. Eisenbise, 4 Watts, 134.

⁵ Peaslee v. Barney, 1 D. Chip. 331; Armstrong v. Stovall, 26 Missis. 275.

⁶ Martin v. Root, 17 Mass. 222. But see Anderson v. Belcher, 1 Hill, S. C. 246. And see Crawford v. Lehr, 20 Kan. 509.

§ 1199. *The Doctrine of this Chapter restated.*

Assignors and assignees, as parties, sustain somewhat differing relations, with rights and duties in a degree variable, according to the nature of the thing assigned, and the manner of the assignment; sometimes, also, according to whether the litigation is at law or in equity. To retrace the lines of distinction in the present section would be superfluous. What is said in this chapter is meant only to show the relations of the parties; a full exposition of the law of assignment was not its purpose.

CHAPTER XLVI.

CREDITORS.

§ 1200. **Power over One's Own.** — Every person is entitled to do what he will with his own, — whether his own services, his own conduct, or his own property,¹ — so long as he interferes with no rights of others. If a man marries, he has obligated himself to support his wife and children, and their claims must be respected.² Or, if he incurs debts, he has placed himself and his property under a liability to his creditors, and it cannot be cast off. How far the creditor may interfere with his contracting is the inquiry for this chapter.

§ 1201. **Nature of Creditor's Claim.** — Sometimes a creditor has a lien on a particular article of property, — as, where it is mortgaged or pledged to him, or he has done work on it and it has not left his possession, or he has seized it on legal process, — but this is not for consideration here. Aside from such lien, the debtor's property, from which might be derived the means of payment, or from which it might be enforced by levy, was one of the other's main inducements to become a creditor. And the debtor defrauds him if, after the debt is contracted, he puts this property beyond the reach of the law; or if, to avoid paying future debts, he first puts it so, and then contracts them. Somewhat to particularize, —

§ 1202. **Conspiracy.** — A conspiracy between two or more persons to cheat a third is both a civil and a criminal wrong. It is at the common law indictable, even before any overt act in pursuance of it has been performed.³ And when the parties have so far proceeded in the evil combination as actually

¹ Ante, § 82, 210; 1 Bishop Crim. Law, § 514, 576.

² Ante, § 234, 235, 906, 910, 949.

³ 2 Bishop Crim. Law, § 185, 198–214.

to injure another, they are answerable to him in a civil suit.¹ On this principle, if, in any manner, a debtor and another person combining put the former's property where a creditor cannot reach it by legal process, the latter, after the combination has resulted in cheating him, has his proper legal remedy against them.² But —

§ 1203. **As between Parties.** — A conspirator who, to cheat his creditors, conveys goods to his co-conspirator, can neither reclaim them nor enforce an executory promise to pay for them; but, the parties being equally in the wrong, the law will assist neither.³ Some courts qualify this doctrine to the extent that, since only creditors are entitled to complain, the contract, whether executory or executed, will, while they acquiesce, be good between the parties.⁴ This qualification, if accepted, operates only on the executory contract; for, by all opinions, the executed conveyance is, as between the parties, irreversible.⁵ On the other hand, —

§ 1204. **Creditor's Rights.** — Not only has the creditor the right of action just mentioned,⁶ but he may avoid the conveyance which his debtor has made to a co-conspirator, to cheat him.⁷

§ 1205. **Statutes.** — The foregoing doctrines of the unwrit-

¹ *Herron v. Hughes*, 25 Cal. 555; *Page v. Parker*, 43 N. H. 363; *Jones v. Westervelt*, 7 Cow. 445; *Gregory v. Brunswick*, 6 Scott N. R. 809, 8 Jur. 148, 3 C. B. 481.

² *Adams v. Paige*, 7 Pick. 542, 549; *Hall v. Eaton*, 25 Vt. 458; *Penrod v. Morrison*, 2 Pa. 126.

³ *Ante*, § 489, 816, 835; *Ager v. Duncan*, 50 Cal. 325; *Heineman v. Newman*, 55 Ga. 262; *Harwood v. Knapper*, 50 Misso. 456; *Burleigh v. White*, 64 Maine, 23; *Gill v. Henry*, 14 Norris, Pa. 388.

⁴ *Harvey v. Varney*, 98 Mass. 118; *Van Wy v. Clark*, 50 Ind. 259; *Dietrich v. Koch*, 35 Wis. 618; *Roberts v. Lund*, 45 Vt. 82; *Hess v. Final*, 32 Mich. 515; *Shaw v. Jeffery*, 13 Moore P. C. 432. And see *Noble v. Noble*, 26 Ark. 317.

⁵ Cases above cited; also *Edwards v.*

Haverstick, 53 Ind. 348; *Etter v. Anderson*, 84 Ind. 333; *Fivaz v. Nicholls*, 2 C. B. 501; *Begbie v. Phosphate Sewage Co.* Law Rep. 10 Q. B. 491, 499, 500; *Hall v. Callahan*, 66 Misso. 316; *Bartlett v. Bartlett*, 13 Neb. 456; *Allison v. Hagan*, 12 Nev. 38; *Holliday v. Holliday*, 10 Iowa, 200; *White v. Brocaw*, 14 Ohio State, 339; *Nellis v. Clark*, 20 Wend. 24.

⁶ *Ante*, § 1202.

⁷ *Lowry v. Pinson*, 2 Bailey, 324; *Ludlow v. Gill*, 1 D. Chip. 49; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Drummond v. Couse*, 39 Iowa, 442; *Bowden v. Bowden*, 75 Ill. 143; *Means v. Feaster*, 4 S. C. 249. And see *Loeschigk v. Bridge*, 42 N. Y. 421; *Smith v. Rumsey*, 33 Mich. 183; *Barber v. Terrell*, 54 Ga. 146.

ten law are affirmed and perhaps extended by legislation. Of early English enactments affirming them,¹ are 50 Edw. 3, c. 6; 2 Rich. 2, stat. 2, c. 3; and 3 Hen. 7, c. 4.² But these were nearly or quite absorbed and superseded by 13 Eliz. c. 5, and 27 Eliz. c. 4, to which reference is almost exclusively made in later times. These statutes are accepted in our States as unwritten law,³ and they are constantly cited in our tribunals. Their construction was not fully settled in England early enough to be in all particulars binding here,⁴ and our courts have made some departures from the later English expositions. Moreover, in most of our States, domestic legislation has spoken on this subject, and not always in the precise terms of the English. Hence, —

§ 1206. **What for this Place.** — It will not be well here, with our limited space, to enter into the details of these statutes. But we may take a brief view of some leading rules derivable alike from them and from the common law. Thus, —

§ 1207. **Exempt Property.** — It is no fraud on a creditor for the debtor to deal as he will with property which the law exempts from attachment or seizure for the debt; therefore no conveyance of exempt property, even though made with intent to defraud creditors, can be avoided by them.⁵ And an assignment for the benefit of creditors, excepting such property, is not, therefore, fraudulent or otherwise void.⁶ Again, —

§ 1208. **Labor of Debtor and Family.** — The law, while it lays hold of the debtor's property and out of it pays the creditor, will not force him to work for the same end.⁷ *A fortiori*,

¹ Kimball v. Hutchins, 3 Conn. 450; Sewall v. Glidden, 1 Ala. 52; Teasdale v. Atkinson, 2 Brev. 48.

² Wilson v. Cheshire, 1 McCord Ch. 233.

³ Bishop Dir. & F. § 481; 1 Bishop Crim. Law, § 572 a; The State v. Moore, Meigs, 476, 478; Cathcart v. Robinson, 5 Pet. 264; Robinson v. Holt, 39 N. H. 557; Gardner v. Cole, 21 Iowa, 205.

⁴ Baltimore v. Williams, 6 Md. 235.

⁵ Winchester v. Gaddy, 72 N. C. 115; O'Conner v. Ward, 60 Missis. 1025; Hixon v. George, 18 Kan. 253; Delashmut v. Trau, 44 Iowa, 613. And see Tracy v. Cover, 28 Ohio State, 61.

⁶ Richardson v. Marqueze, 59 Missis. 80.

⁷ Rush v. Vought, 5 Smith, Pa. 437; Ford v. Jermon, 6 Philad. 6; Teeter v. Williams, 3 B. Monr. 562.

therefore, it will not thus compel his wife or child. Under the common-law rules, a wife's earnings are the husband's even though he does not support her, and the minor children's are the father's while he maintains them yet no longer. So that when the man, woman, or child has earned for the man money or other property, or an indebtedness to him for his or their services, his creditors may lay claim thereto. But he can give away his services or theirs not reduced to earnings, and no creditor can then have the products. Since he can give them away, and since the larger includes the less, he can make any other arrangement he pleases concerning them, and creditors cannot interfere. These views are fully sustained by a part of the adjudications, yet with others they do not accord, or accord in various degrees. The author has so fully explored these questions elsewhere that he deems it unnecessary to consider them further here.¹

§ 1209. **Preferring Creditors.** — The common law permits a failing debtor to pay in full such creditors as he chooses to prefer, while necessarily the others suffer.² But the statutes of bankruptcy and insolvency, one object of which is the equal distribution of the effects,³ commonly provide otherwise.

§ 1210. **Protection to Purchasers.** — Though one sells his property with the undisclosed intent to put the money in his pocket and cheat his creditors, the honest buyer at a fair price, with nothing to excite suspicion or inquiry,⁴ is protected

¹ 2 Bishop Mar. Women, § 450-477. In connection with which, consult 1 Ib. § 215, 733, 783; 2 Ib. § 299, 302; 2 Bishop Mar. & Div. § 528; Wilson v. McMillan, 62 Ga. 16; Johnson v. Silsbee, 49 N. H. 543; Patterson v. Campbell, 9 Ala. 933. Of the cases cited in Bishop Mar. Women, see particularly Abbey v. Deyo, 44 N. Y. 343; Peterson v. Mulford, 7 Vroom, 481; Bucher v. Ream, 18 Smith, Pa. 421; Hallowell v. Horter, 11 Casey, Pa. 375; Brown v. Pendleton, 10 Smith, Pa. 419; Elliott v. Bently, 17 Wis. 591.

² Thornton v. Davenport, 1 Scam. 296; Francis v. Rankin 84 Ill. 169;

Wilkes v. Ferris, 5 Johns. 335; Phoenix v. Dey, 5 Johns. 412; Thornton v. Tandy, 39 Texas, 544; Sands v. Peirson, 61 Iowa, 702; O'Donald v. Constant, 82 Ind. 212; Leppig v. Bretzel, 48 Mich. 321; Ayers v. Adams, 82 Ind. 109; Strauss v. Rose, 59 Md. 525; Lininger v. Raymond, 12 Neb. 19, 167; Tootle v. Coldwell, 30 Kan. 125; Elliott v. Benedict, 13 R. I. 463; Guggenheimer v. Brookfield, 90 N. C. 232; Nostrand v. Atwood, 19 Pick. 281; State Bank v. Whittle, 48 Mich. 1.

³ Dexter v. Snow, 12 Cush. 594.

⁴ Kellogg v. Aherin, 48 Iowa, 299; Dorrington v. Minnick, 15 Neb. 397.

in his purchase ;¹ his equity being deemed superior to that of a creditor.² But —

§ 1211. **Receiver of Gift.** — One who takes the property in mere gift is inferior in equity to the creditor. And, however honest he may be, the giver's creditor of prior date may have it as against him.³

§ 1212. **Other Questions.** — There are, connected with this subject, various other questions, depending on a mingling of the foregoing principles with the not altogether uniform statutes of our different States ; to discuss which, would take us over ground not quite within the domain of the present chapter. Of questions not profitable unless the statutes were before us, are some nice distinctions between present and future debts, and conveyances to defraud future creditors.

§ 1213. *The Doctrine of this Chapter restated.*

The doctrine of this chapter is, that, when one makes himself the debtor of another, he confers on him certain rights as to property out of which the law compels payment. If, to defraud the creditor, he disposes of it to one who is a partaker in the fraud, the creditor may, on due legal proceedings, subject it to the payment of the debt. Or, if the debtor gives it away to one who even receives it honestly, the same consequence will follow. But an honest purchaser, for value, with nothing to excite his suspicion or put him on inquiry, is protected. This subject has, from early times, been legislated upon in England and in our States, yet not in abrogation of these principles of the unwritten law.

¹ Hurley v. Taylor, 78 Misso. 238 ; Miller v. Kirby, 74 Ill. 242 ; Hatch v. Jordon, 74 Ill. 414 ; Hedman v. Anderson, 6 Neb. 392 ; Collins v. Cook, 40 Texas, 238 ; Spicer v. Robinson, 73 Ill. 519 ; Massie v. Enyart, 32 Ark. 251 ; Farlin v. Sook, 30 Kan. 401 ; Sharpe v. Williams, 76 N. C. 87.

² Enders v. Williams, 1 Met. Ky. 346.

³ 2 Kent Com. 440 ; Early v. Owens, 68 Ala. 171 ; Mohawk Bank v. Atwater,

2 Paige, 54 ; Clark v. Depew, 1 Casey, Pa. 509 ; Crawford v. Kirksey, 55 Ala. 282 ; Bogard v. Gardley, 4 Sm. & M. 302 ; Vertner v. Humphreys, 14 Sm. & M. 130 ; Crumbaugh v. Kugler, 2 Ohio State, 373 ; Young v. White, 25 Missis. 146 ; Gruder v. Bowles, 1 Brev. 266 ; Bohannon v. Combs, 79 Misso. 305 ; Iles v. Cox, 83 Ind. 577 ; Goodman v. Wineland, 61 Md. 449 ; Van Bibber v. Mathis, 52 Texas, 406.

CHAPTER XLVII.

OTHER THIRD PERSONS.

§ 1214. **Having Interest, or not.** — One has no rights regarding any contract between other persons, unless it affects his interests.¹ But we saw in the last chapter, that, under circumstances pointed out, a creditor may overthrow a contract which his debtor and another have made in obstruction of his prior claims. And we shall see, in this chapter, that one not a party may assert a pecuniary interest of his own in a contract between other persons. Thus, —

§ 1215. **Trusts.** — If one conveys property to another, directing that it shall be held for the benefit of a third, who is not a party to the transaction, a right is thus created in the third person, and he can enforce it in a court of equity.² Or, —

§ 1216. **Resulting Trusts.** — If one who has another's money to invest in land, causes, on doing it, the deed to be made to himself, the law will create a resulting trust; whereupon the equity court will compel him to hold the legal title for the benefit of him by whose money it was procured.³ And all persons who, in any of the innumerable ways possible, take or retain a title to either real or personal property, which is truly another's, are by the law made the trustees of the true owner.⁴ Again, —

¹ *Boyer v. Tressler*, 18 Ind. 260; *Chapin*, 130 Mass. 128; *Preachers Aid Soc. v. England*, 106 Ill. 125.
Simson v. Brown, 68 N. Y. 355; *Reid v. Vanderheyden*, 5 Cow. 719.

² 2 Story Eq. § 961-964, 974, 974 a; *590; Murry v. Sell*, 23 W. Va. 475; *Railroad v. Durant*, 95 U. S. 576; *Mory Heiskell v. Powell*, 23 W. Va. 717; *v. Michael*, 18 Md. 227; *Harrisburg Newton v. Taylor*, 32 Ohio State, 399; *Bank v. Tyler*, 3 Watts & S. 373; *Allen Cobb v. Knight*, 74 Maine, 253.
v. Withrow, 110 U. S. 119; *Chace v.*

⁴ *Statesville Bank v. Simonton*, 86

§ 1217. **Other Contract.** — Any other contract may be made for the benefit, or for the burdening, of one who is not a party. We saw much of this in connection with the subject of agency.¹ Thus, —

§ 1218. **Burden.** — It is legitimate for one person to promise a second that a third shall do a particular thing; for example, give to the second person a bond for a deed.² Then, if the third person refuses to do it, as ordinarily he may,³ the contract is broken.⁴ Or, what is practically more common, —

§ 1219. **Benefit.** — The bargain between the parties may be, that one of them shall confer a benefit on a third person. And, if the consideration for it is adequate, the consequence does not depend on the motive; as, whether it was to do a favor to the third person, or was an arrangement of convenience to the parties. Nor is it material in whose name the rules of practice require the action to be brought; as, whether at law by one party against the other, or at law by the third person against the party promising, or by a suit in equity. The third person has open to him the one of these three methods which the particular facts and the practice of the court may indicate. Thus, —

§ 1220. **How sue.** — Commonly the third person, for whose benefit one has made to another a simple-contract promise on adequate consideration, may sue thereon in his own name.⁵

N. C. 187; *Felton v. Smith*, 84 Ind. 485; *Robbins v. Robbins*, 89 N. Y. 251; *Keller v. Kunkel*, 46 Md. 565; *Link v. Link*, 90 N. C. 235; *Wright v. Gay*, 101 Ill. 233; *Smith v. Smith*, 85 Ill. 189; *Byington v. Moore*, 62 Iowa, 470; *Connor v. Follansbee*, 59 N. H. 124; *Bailey's Appeal*, 15 Norris, Pa. 253; *Cox v. Arnsmann*, 76 Ind. 210; *Blakeslee v. Starring*, 34 Wis. 538; ante, § 194.

¹ Ante, § 1074–1110.

² *Stevenson v. Fuller*, 75 Maine, 324.

³ **Bank Check.** — As to whether a bank may refuse to pay a check which a depositor, having funds therein, has drawn upon it, see *State Sav. Assoc. v. Boatmen's Sav. Bank*, 11 Misso. Ap. 292. But its refusal, whether right or

wrong, leaves the drawer holden. *Murray v. Judah*, 6 Cow. 484; *Harker v. Anderson*, 21 Wend. 372; *Sherman v. Comstock*, 2 McLean, 19.

⁴ *Stevens v. Webb*, 7 Car. & P. 60, 62.

⁵ *Hendrick v. Lindsay*, 93 U. S. 143; *Green v. Richardson*, 4 Colo. 584; *Felton v. Dickinson*, 10 Mass. 287; *Cabot v. Haskins*, 3 Pick. 83; *Brice v. King*, 1 Head, 152; *Clarke v. McFarland*, 5 Dana, 45; *Edwards v. Smith*, 63 Misso. 119; *Campbell v. Smith*, 71 N. Y. 26; *Green v. Morrison*, 5 Colo. 18; *Meyer v. Lowell*, 44 Misso. 328; *Anthony v. Herman*, 14 Kan. 494; *Snell v. Ives*, 85 Ill. 279; *Stariha v. Greenwood*, 28 Minn. 521; *Todd v. Weber*, 95 N. Y. 181.

But this is not held quite so in all the States ;¹ and there are exceptions, more or less generally recognized.² For example, if one takes a deed of land, subject to a prior mortgage, promising to pay to the mortgagee, who is not a party to the transaction, the mortgage debt, this promise can transmit no right, consequently no right of action, to him ; it can operate only as a guaranty to the mortgagor, now the grantor in the deed, who may sue upon it personally after he has been damnified. For to this extent only, whatever be the words of promise, does the consideration³ go. The land is the sole consideration in the case ; the mortgagee had, for his security, the whole of it, including what the grantee in the deed now takes, by the prior conveyance to him. Nothing passes to the grantee in the deed, which can be deemed a fund out of which to pay the mortgage, except what the mortgagee already holds under a prior title. *As to him*, there is no consideration, either put into his own hands, or placed in the hands of the party to the deed for his use, — not even a gift of an atom, — which can operate, directly or indirectly, as a consideration for the promise to pay *him*. As to any rights of his, the promise is simply void, and there is no occasion to inquire who shall be the parties.⁴ In specialties, most courts

¹ *Robertson v. Reed*, 11 Wright, Pa. 115 ; *Kountz v. Holthouse*, 4 Norris, Pa. 235 ; *Eastman v. Ramsey*, 3 Ind. 419 ; *Bird v. Lanius*, 7 Ind. 615 ; *Davis v. Calloway*, 30 Ind. 112 ; *Durham v. Bischof*, 47 Ind. 211.

² *Dow v. Clark*, 7 Gray, 198.

³ *Thornton v. Smith*, 7 Misso. 86.

⁴ *Mellen v. Whipple*, 1 Gray, 317. This was one of the last cases I ever argued to a court ; it was after I had left practice for law writing, — a remnant lingering from former business. The opinion in the report does not make the reasoning which carried the tribunal so plain as might be desired. The learned judge, who wrote it, once expressed to me his dissatisfaction with it in this respect. And I remember, that, sometime afterward, a very eminent lawyer in another State, getting from the reason-

ing not even a glimmer of the real doctrine, wrote me asking whether I really believed it ; or whether, as it seemed to him, I had played a trick on the court, and humbugged the entire bench. I certainly believed it then, and do yet ; that is, the doctrine which I argued to the judges, and which, I know, led to the conclusion. I know this because of observations made by individual judges, particularly the very eminent Chief Justice, and questions to the opposing counsel, during and at the close of the arguments. This question has since been before various other courts ; and, so far as I have observed, the real argument has seldom been understood. See further as to this question and case, *Crowell v. Hospital of St. Barnabas*, 12 C. E. Green, 650.

do not permit a suit in the third person's name, yet some do.¹ In trusts, the suit at law is in the name of the trustee;² in equity, oftener in the name of the *cestui que trust*, sometimes the trustee joining.³ And it is the nearly or quite universal course in equity to make the plaintiff in interest the plaintiff of record.⁴ There are minor distinctions; but, on a question of mere practice, it would not accord with the plan of this work to proceed further. Returning from practice to doctrine, —

§ 1221. **On what Principle — (Gift).** — When the third person has put something of his own into the consideration for the contract, the promise therein for his benefit is but the natural return therefor, and the propriety of permitting him to avail himself of it is obvious. But the greater number of cases are of a different sort; the promise is a gift, or the tender of a gift, made by the parties either out of kindness to him, or for their own convenience. An illustration of the former sort is a voluntary conveyance of property by a husband to a trustee, who promises to hold it for the grantor's wife,⁵ to her separate use. An illustration of the latter sort is the promise, by the purchaser of a business, to pay the subsisting debts. Now, —

§ 1222. **Accepting or rejecting Gift.** — Though the law presumes that one accepts what is tendered him for his benefit,⁶ still he has the right to decline, and the fact may be that he does. The case is one of election and waiver, already explained;⁷ or, exactly, it is within the principle of unauthorized contracts by agents, and their ratification.⁸ Hence, —

§ 1223. **Parties receding or not.** — Since a contract between two in favor of a third, who had no part in it, is the mere tender of a benefit, the two can mutually rescind it at any

¹ Ante, § 1070; *Millard v. Baldwin*, Maine, 82; *Burlew v. Hillman*, 1 C. E. 3 Gray, 484; *Clarkson v. Doddridge*, Green, 23.

² 14 Grat. 42.

³ *Treat v. Stanton*, 14 Conn. 445.

⁴ *Dunn v. Seymour*, 3 Stock. 220; *Tucker v. Palmer*, 3 Brev. 47.

⁵ *Frye v. Bank of Illinois*, 5 Gilman, 332; *Mason v. York, &c. Railroad*, 52

⁶ *Scruggs v. Alexander*, 72 Misso. 134.

⁷ Ante, § 351, 923.

⁸ Ante, § 777-808.

⁹ Ante, § 1091.

time before acceptance by the third.¹ Afterward, and in other circumstances, the rescission requires the concurrence of the third person.² And this is within the general doctrine, that, where one bargains for another without authority, the latter may ratify³ or repudiate⁴ the bargain at his pleasure. Again, —

§ 1224. **Sort of Contract.** — As the third person occupies a position analogous to that of an assumed principal for whom one has contracted as agent without authority, the promise must in terms be for his benefit;⁵ and he must be legally competent to receive the thing, and perform his part.⁶

§ 1225. **Other Principles** — of the law of unauthorized agency may well be applied to this contract; such as, that the ratification must be either with full knowledge of what has been done;⁷ “or,” in the words of Willes, J., “with intention to adopt it at all events and under whatever circumstances;”⁸ lacking which, it may be avoided, at least to the extent of the misapprehension.⁹ It must be of the entire provision or none;¹⁰ and, if the contract was fraudulent, it must include the fraud and its consequences.¹¹ Finally, —

¹ *Merrick v. Giddings*, 1 Mackey, 394; *Amonett v. Montague*, 75 Misso. 43; *Thompson v. Parker*, 83 Ind. 96. See *Humphrey v. Worth*, 3 Out. Pa. 185.

² *Levistones v. Landreaux*, 6 La. An. 26. And see *Wood v. McCain*, 7 Ala. 800; *Taylor v. Robinson*, 14 Cal. 396; *Fiske v. Holmes*, 41 Maine, 441.

³ Ante, § 1106, 1108; *Grant v. Beard*, 50 N. H. 129; *Ryan v. Doyle*, 31 Iowa, 53; *Bronson v. Chappell*, 12 Wal. 681; *Dresser v. Wood*, 15 Kan. 344; *Workman v. Campbell*, 57 Misso. 53; *Bryan v. Robert*, 1 Strob. Eq. 334; *Hammond v. Hannin*, 21 Mich. 374; *Wright v. Burbank*, 14 Smith, Pa. 247; *Williams v. Butler*, 35 Ill. 544; *McIntyre v. Park*, 11 Gray, 102; *Bragg v. Fessenden*, 11 Ill. 544.

⁴ Ante, § 781, 784, 823, 831, 1106.

⁵ Ante, § 1106, 1108; *Collins v. Suau*, 7 Rob. N. Y. 623; *Commercial, &c. Bank v. Jones*, 18 Texas, 811.

⁶ *McCracken v. San Francisco*, 16

Cal. 591; *Ashbury Railway, &c. Co. v. Riche*, Law Rep. 7 H. L. 653, 674, 679.

⁷ Ante, § 1109; *Rowan v. Hyatt*, 45 N. Y. 138; *Clarke v. Lyon*, 7 Nev. 75; *Bray v. Gunn*, 53 Ga. 144; *Owings v. Hull*, 9 Pet. 607; *Dickinson v. Conway*, 12 Allen, 487; *Pittsburgh, &c. Railroad v. Gazzam*, 8 Casey, Pa. 340.

⁸ *Phosphate of Lime Co. v. Green*, Law Rep. 7 C. P. 43, 57.

⁹ *Miller v. Sacramento*, 44 Cal. 166.

¹⁰ Ante, § 1110; *Southern Express v. Palmer*, 48 Ga. 85; *Crawford v. Barkley*, 18 Ala. 270; *Henderson v. Cummings*, 44 Ill. 325; *Widner v. Lane*, 14 Mich. 124; *Coleman v. Stark*, 1 Oregon, 115. See *Bangor Boom Corp. v. Whiting*, 29 Maine, 123.

¹¹ Ante, § 1112-1114; *Crans v. Hunter*, 28 N. Y. 389; *Law v. Grant*, 37 Wis. 548. See *Brook v. Hook*, Law Rep. 6 Ex. 89.

§ 1226. **Methods of Ratification.** — The doctrines as to the methods of ratifying other unauthorized contracts¹ apply to these. One is the express authorization of the bargaining, in terms as though it had not been done.² Another is, by accepting and using what is thus promised;³ or, by any other conduct in harmony only with the theory of ratification.⁴ Hence, bringing a suit on an unauthorized contract affirms it;⁵ and such, in some circumstances, is the neglect to repudiate what one knows to have been done.⁶

§ 1227. *The Doctrine of this Chapter restated.*

It is common in the affairs of life, and approved by the law, for one person to hold title to a thing for the benefit of another. The ordinary case is technically termed a trust. But the principle extends also to like arrangements not known by this name. Where two persons make a contract partly or altogether for the benefit of a third, one or both of the two occupy in effect the place of trustees, and the third is a sort of *cestui que trust*. If he had no part in the arrangement, he may accept or decline the benefit as he chooses. If he procured it, or if, being a stranger to the arrangement, he confirmed it on its coming to his knowledge, the law permits him, like any other *cestui que trust*, to enforce his rights in the tribunals. But, like any other party in interest, he must adapt his forms of procedure to the course of the court to which he applies.

¹ Ante, § 1109.

² Rice v. McLarren, 42 Maine, 157.

³ Ketchum v. Verdell, 42 Ga. 534; Lyman v. Norwich University, 28 Vt. 560.

⁴ Maddux v. Bevan, 39 Md. 485; Hankins v. Baker, 46 N. Y. 666; Doughaday v. Crowell, 3 Stock. 201; Skinner v. Dayton, 19 Johns. 513; Perkins v. Missouri, &c. Railroad, 55 Misso. 201. See Fried v. Royal Ins. Co. 50 N. Y. 243; White v. Sanders, 32 Maine, 188.

⁵ Beloit Bank v. Beale, 34 N. Y. 473; First Parish in Sutton v. Cole, 3 Pick.

232; Dodge v. Lambert, 2 Bosw. 570; Hampshire v. Franklin, 16 Mass. 76, 87; Corser v. Paul, 41 N. H. 24; Franklin v. Ezell, 1 Sneed, Tenn. 497; Walker v. Mobile, &c. Railroad, 34 Missis. 245. See St. Mary's Bank v. Calder, 3 Strob. 403.

⁶ Brigham v. Peters, 1 Gray, 139; Lindsley v. Malone, 11 Harris, Pa. 24; Bray v. Gunn, 53 Ga. 144; Ward v. Williams, 26 Ill. 447; Law v. Cross, 1 Black, 533; Owsley v. Woolhopter, 14 Ga. 124. See Clarke v. Meigs, 10 Bosw. 337; Reese v. Medlock, 27 Texas, 120.

BOOK III.

CONTRACTS REQUIRED TO BE IN WRITING.

CHAPTER XLVIII.

THE STATUTE OF FRAUDS.

§ 1228. Introduction.

1229–1233. The Statute.

1234–1249. Rules Common to the Several Clauses.

1250–1255. Promises by Executors and Administrators.

1256–1266. Promise to answer for Another.

1267–1271. On Consideration of Marriage.

1272–1284. Not to be performed within a Year.

1285. Doctrine of Chapter restated.

§ 1228. **How Chapter divided.** — We shall consider, I. The Statute; II. Rules Common to the Several Clauses; III. Promises by Executors and Administrators; IV. The Promise to answer for another's Debt, Default, or Miscarriage; V. The Agreement on Consideration of Marriage; VI. Agreements not to be Performed within a Year.

I. *The Statute.*

§ 1229. **Origin and History.** — Just one hundred years prior to the Declaration of our National Independence, the parliament of the mother country enacted the most important statute ever promulgated in either country, relating to civil affairs. It is 29 Car. 2, c. 3, A. D. 1676, entitled "An Act for Prevention of Frauds and Perjuries." After a lapse of over two hundred years, during which its influence has been

constantly present in every avenue of business, it is still, as to the clauses explained in this chapter, in force in England.¹ It came subsequently to the settlement of the earlier American colonies, but it was accepted as law in Maryland² and probably in some of the others.³ And, —

§ 1230. **American Legislation.** — In all our States, with perhaps one or two exceptions, statutes have been enacted on the pattern of this one; yet with enough of slight differences from it, and from one another, to admonish practitioners to consult and take for their guide, each the statute-book of his own State.⁴ This enactment, whether spoken of with reference to the English law or that of any one of our States, is termed, for short, the “Statute of Frauds.”

§ 1231. **Changes wrought thereby.** — By the prior law, as already seen,⁵ nearly every contract had the same effect when oral as when written. This statute selects from the mass of contracts certain ones, and makes writing essential to them, leaving the rest where they stood before. Those for this chapter, including such as relate to land, to be explained in the next, depend on the —

§ 1232. **Fourth Section** — as follows: —

“No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any

¹ As to modifications and repeals of parts, see 7 Will. 4 & 1 Vict. c. 26, § 2; 42 & 43 Vict. c. 59, § 2; 44 & 45 Vict. c. 59, § 3.

² *Clayland v. Pearce*, 1 Har. & McH. 29; *Kilty Rep. Stats.* 240.

³ *Bishop First Book*, § 54, 56, 58.

⁴ *Bowman v. Conn*, 8 Ind. 58; *Violett v. Patton*, 5 Cranch, 142; *Sorrell v. Jackson*, 30 Ga. 901; *D'Wolf v. Rabaud*, 1 Pet. 476; *Westheimer v. Peacock*, 2 Iowa, 528; *Dunn v. Tharp*, 4 Ire. Eq.

7; *Thornton v. Corbin*, 3 Call, 384; *Ball v. Ball*, 2 Bibb, 65; *Badon v. Bahan*, 4 La. An. 467; *Riddle v. Ratliff*, 8 La. An. 106; *Allen v. Moss*, 27 Misso. 354; *Gibson v. Chouteau*, 39 Misso. 536; *Monroe v. Searcy*, 20 Texas, 348; *Thomas v. Hammond*, 47 Texas, 42; *Wolf v. Dozer*, 22 Kan. 436; *Patmor v. Haggard*, 78 Ill. 607; *Harvey v. Gardner*, 41 Ohio State, 642, 646; *Philbrook v. Belknap*, 6 Vt. 383.

⁵ Ante, § 151-160; post, § 1326.

agreement that is not to be performed within the space of one year from the making thereof: *unless* the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

§ 1233. **Seventeenth Section.** — The seventeenth section, relating to the sale of goods, to be quoted in the chapter on that subject,¹ is in terms somewhat different; and it should not be confounded with this fourth section.

II. *Rules Common to the Several Clauses.*

§ 1234. **After executed.** — The statute, instead of declaring the unwritten contract to be without effect, provides only that "no action shall be brought whereby to charge" another on it.² When, therefore, it has been executed, and so there is no longer occasion for an "action," the result is precisely the same as though there were no statute; if the oral bargaining, thus consummated, would have been good before its enactment, no more can it be invalidated now.³ Even, —

§ 1235. **Executed on one Side.** — Looking again at the terms of the statute, the reader perceives that, largely, they bind one of the parties to a bargaining, not both. No action is to be brought on certain oral promises specified, — such as, to pay another's debt, to sell lands, or do anything else after the lapse of a year, — but the inhibition does not extend to the consideration which the other party undertakes to pay for the doing. Hence, when the one who need not have done the thing because his promise was oral, has voluntarily performed, he may have his action against the other for the consideration orally promised, the statute not forbidding.⁴ But

¹ Post, § 1311.

² *Fowler v. Burget*, 16 Ind. 341; *Montgomery v. Edwards*, 46 Vt. 151.

³ Ante, § 634; *Stone v. Dennison*, 13 Pick. 1; *Bolton v. Tomlin*, 5 A. & E. 856; *Swanzy v. Moore*, 22 Ill. 63; *Nutting v. McCutcheon*, 5 Minn. 382; *Slatter v. Meek*, 35 Ala. 528; *McCue v.*

Smith, 9 Minn. 252; *Westfall v. Parsons*, 16 Barb. 645; *Shaw v. Woodcock*, 7 B. & C. 73; *Newman v. Nellis*, 97 N. Y. 285; *Crane v. Gough*, 4 Md. 316. See *Sanderson v. Graves*, Law Rep. 10 Ex. 234, 238, 241.

⁴ *Sims v. McEwen*, 27 Ala. 184; *McGlucky v. Bitter*, 1 E. D. Smith, 618;

if it is the consideration which has been thus voluntarily rendered, whether partly or even fully, the one from whom it proceeded cannot sue the other who refuses; because the statute forbids.¹ Even such other, after having partly performed, may, except where barred by estoppel,² confronted by equity, or something else out of the ordinary course, there stop, and in a court of law rely on the statute as to the residue.³

§ 1236. **Remedies after Performance in Part.** — When the one party to the oral bargaining has paid the consideration or any portion of it, and the other, relying on the statute, refuses the promised performance, the former may recover back, in a suit at law, the money or other value which he has paid.⁴ But he cannot so recover it if the latter stands ready to perform.⁵ There are cases of hardship, less simple in their facts, to which this remedy at law is not adapted; nor, for some of them, do our forms of judicial procedure furnish any remedy. Still, —

§ 1237. **In Equity.** — under the jurisdiction to suppress fraud, relief may be granted in some of the cases to which the forms at law are imperfectly or not at all adapted. Though the Statute of Frauds binds the equity⁶ the same as the law tribunals, it does not abrogate the prior equity jurisdiction over fraud. And it is a palpable fraud for one man to entice another with promises to change his course of action,

Ray v. Young, 13 Texas, 550; Zabel v. Schroeder, 35 Texas, 308; Philbrook v. Belknap, 6 Vt. 383; Knowlman v. Bluett, Law Rep. 9 Ex. 1; Adams v. Honness, 62 Barb. 326, 335, 336; Tinkler v. Swaynie, 71 Ind. 562.

¹ Kidder v. Hunt, 1 Pick. 328; Pierce v. Paine, 28 Vt. 34; Wood v. Jones, 35 Texas, 64; Flenner v. Flenner, 29 Ind. 564; Davis v. Moore, 9 Rich. 215; Osborn v. Phelps, 19 Conn. 63; Hawley v. Moody, 24 Vt. 603.

² Miller v. McManis, 57 Ill. 126; Brightman v. Hicks, 108 Mass. 246.

³ Baldwin v. Palmer, 6 Selden, 232; Kidder v. Hunt, 1 Pick. 328; Weir v. Hill, 2 Lans. 278; Hubert v. Turner, 4

Scott, N. R. 486, Car. & M. 351, 6 Jur. 194.

⁴ Hawley v. Moody, 24 Vt. 603; Marquat v. Marquat, 7 How. Pr. 417; Baldwin v. Palmer, 6 Selden, 232, 235; Montague v. Garnett, 3 Bush, 297.

⁵ Coughlin v. Knowles, 7 Met. 57 (which compare with King v. Welcome, 5 Gray, 41, 44); Swanzy v. Moore, 22 Ill. 63; Plummer v. Bucknam, 55 Maine, 105.

⁶ Watson v. Erb, 33 Ohio State, 35, 50; Abell v. Calderwood, 4 Cal. 90; Patterson v. Yeaton, 47 Maine, 308; Beaman v. Buck, 9 Sm. & M. 207; Skipwith v. Dodd, 24 Missis. 487.

and to his injury part with his effects or his services, then fall back on the statute to avoid doing what he had led the other to expect. Therefore, in cases within this principle,¹ and not remediable at the common law, equity will compel performance, or compel some other proper adjustment. Herein, as on other questions, the courts of the present day follow the ancient precedents. Ordinarily, perhaps always,² they cover simply real estate transactions; the line of precedent may not in every particular be wisely drawn; but, as a whole, it is believed to conform to natural justice. Actual fraud is not always required as foundation for the relief, the constructive will often suffice; namely, fraud in equitable law. And it has become a sort of general rule that, where there is fraud either constructive or actual, and there has been such performance in part or in full on the one side as, if performance is not compelled on the other, will leave the former party defrauded,³ equity will enforce it. A minuter unfolding of the doctrine here is not desirable.⁴ This is not, as the non-professional reader might deem, a violation of the statute; for every statute, even a written constitution, is, and ought to be, interpreted as subject to qualifications and exceptions

¹ This is the principle of estoppel *in pais*, or equitable estoppel, applied equally by courts of law and courts of equity. Ante, § 280, 281, 284. But, in the cases contemplated in the text, the forms at law do not admit of its application, while the more flexible forms in equity do.

² *McElroy v. Ludlum*, 5 Stew. Ch. 828.

³ Compare with ante, § 284, 286, 300-302, 309.

⁴ Consult the books on equity jurisdiction; also, *Browne Stat. Frauds*, § 437-502; *Nunn v. Fabian*, Law Rep. 1 Ch. Ap. 35; *Coles v. Pilkington*, Law Rep. 19 Eq. 174; *Caton v. Caton*, Law Rep. 2 H. L. 127, 136, 1 Ch. Ap. 137; *Jervis v. Berridge*, Law Rep. 8 Ch. Ap. 351; *Burnett v. Blackmar*, 43 Ga. 569; *Freeman v. Cooper*, 14 Ga. 238; *Gupton v. Gupton*, 47 Misso. 37; *Annan v. Merritt*, 13 Conn. 478; *Pugh v. Good*,

3 Watts & S. 56; *Watkins v. Watkins*, 24 Ga. 402; *Watson v. Mahan*, 20 Ind. 223; *Cole v. Potts*, 2 Stock. 67; *Malins v. Brown*, 4 Comst. 403; *Ryan v. Dox*, 34 N. Y. 307; *Coyle v. Davis*, 20 Wis. 564; *Blanchard v. McDougal*, 6 Wis. 167; *Parke v. Leewright*, 20 Misso. 85; *Brashier v. Gratz*, 6 Wheat. 528; *Brewer v. Brewer*, 19 Ala. 481; *Weber v. Marshall*, 19 Cal. 447; *Farrar v. Patton*, 20 Misso. 81; *Dickerson v. Chrisman*, 28 Misso. 134; *Ham v. Goodrich*, 33 N. H. 32; *Pinckard v. Pinckard*, 23 Ala. 649; *Davis v. Moore*, 9 Rich. 215; *Meach v. Stone*, 1 D. Chip. 182; *Osborn v. Phelps*, 19 Conn. 63; *Harder v. Harder*, 2 Sandf. Ch. 17; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Brizick v. Manners*, 9 Mod. 284, 285; *Taylor v. Luther*, 2 Sumner, 228; *Brandeis v. Neustadt*, 13 Wis. 142; *Fox v. Longly*, 1 A. K. Mar. 388; *Watson v. Erb*, 33 Ohio State, 35; *Cannon v. Collins*, 3 Del. Ch. 132.

derivable from principles outside itself, else no written law could be safely made, and unintended injustice could not be avoided.¹

§ 1238. **Voidable, not Void.** — The books, following the loose forms of expression already pointed out,² often speak of the oral contract within the Statute of Frauds as “void.” In truth it is not so, but voidable. “No action” shall be maintained to “charge” one upon it, but for all other purposes it is good.³ Thus, —

§ 1239. **Illustrations — (Waiver — Strangers — Pleading).** — The party may perform it if he will;⁴ or, being sued, he may rely on the statute or not at his pleasure; he cannot be compelled.⁵ To avail himself of it, he must plead it⁶ and claim its benefit.⁷ Privies succeed to his right, yet the defence of the statute cannot be made by a stranger.⁸ One suing on a contract required by the statute to be in writing need not aver that it is so, but any setting out of it may be silent as to whether it is written or oral,⁹ — a rule for which other reasons are commonly assigned; yet it is believed that, if the contract was on the face of the averment a mere nullity unless in writing, the special fact which gave it validity must be alleged. Still —

¹ Bishop Written Laws, § 74, 82, 86, 88–90, 92, 102, 103, 123, 131.

² Ante, § 616.

³ Ante, § 1234; *Maddison v. Alderson*, 8 Ap. Cas. 467, 488; *Cooper v. Hornsby*, 71 Ala. 62; *Leroux v. Brown*, 12 C. B. 801; *Fowler v. Burget*, 16 Ind. 341; *Crane v. Gough*, 4 Md. 316; *Sims v. Hutchins*, 8 Sm. & M. 328; *Minns v. Morse*, 15 Ohio, 568; *Potts v. Merrit*, 14 B. Monr. 406; *Philbrook v. Belknap*, 6 Vt. 383; *Swanzy v. Moore*, 22 Ill. 63; *Gray v. Gray*, 2 J. J. Mar. 21; *Harrow v. Johnson*, 3 Met. Ky. 578; *McC Campbell v. McC Campbell*, 5 Litt. 92; *Cornellison v. Cornellison*, 1 Bush, 149; *Lucas v. Mitchell*, 3 A. K. Mar. 244. And see 1 Bishop Mar. Women, § 807, 810, 811; post, § 1323.

⁴ *Aicardi v. Craig*, 42 Ala. 311; *Godden v. Pierson*, 42 Ala. 370;

Whitney v. Cochran, 1 Scam. 209, 210.

⁵ *Jacob v. Smith*, 5 J. J. Mar. 380; *Cahill v. Bigelow*, 18 Pick. 369; *Kirksey v. Kirksey*, 30 Ga. 156.

⁶ *Bailey v. Irwin*, 72 Ala. 505.

⁷ *Skinner v. McDouall*, 2 De G. & Sm. 265, 12 Jur. 741.

⁸ *Chicago Dock Co. v. Kinzie*, 49 Ill. 289, 293; *Bohannon v. Pace*, 6 Dana, 194; *Cooper v. Hornsby*, 71 Ala. 62, 65.

⁹ *Horn v. Shamblin*, 57 Texas, 243; *Benton v. Schulte*, 31 Minn. 312; *Sweetland v. Barrett*, 4 Mont. 217; *Mullaly v. Holden*, 123 Mass. 583; *Marston v. Swett*, 66 N. Y. 206; *Hurlburt v. Wheeler & Wilson Manuf. Co.* 38 Ark. 594, 598; *Porter v. Drennan*, 13 Bradw. 362; *Young v. Austen*, Law Rep. 4 C. P. 553; *Ecker v. Bohn*, 45 Md. 278; *Ecker v. McAllister*, 45 Md. 290.

§ 1240. **Actions other than on Contract.** — The party may plead the statute in bar of a collateral action, based on the contract, as well as of a direct action on the contract itself.¹ Again, —

§ 1241. **Rescission.** — A contract which the statute requires to be written may be rescinded orally.²

There are nice questions relating to the —

§ 1242. “*Memorandum or Note*” of the Agreement: —

Distinguished from “Agreement” — Informal. — The statute distinguishes between the “agreement” and “some memorandum or note thereof,” and declares the latter to be sufficient.³ It may, therefore, be merely informal.⁴ Hence —

§ 1243. **Subsequent Recognition.** — A subsequent recognition, in writing, of a verbal agreement, will be adequate.⁵ But it must be before the suit is brought.⁶

§ 1244. **Signed.** — It must be “signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”⁷ To be merely in the handwriting of such party is not sufficient.⁸ We have already seen what constitutes a signing.⁹ For example, a printed letter-head above the memorandum is a sufficient signing if the jury find that the party meant,¹⁰ or adopted and appropriated, it as such.¹¹ And, broadly, it is immaterial in what part of the instrument the name intended to be a signature is located.¹² A signing by the agent, simply in his own name, is sufficient.¹³

¹ Davis v. Moore, 9 Rich. 215; Banks v. Crossland, Law Rep. 10 Q. B. 97, 100.

² Ante, § 130, 135, 174; Arrington v. Porter, 47 Ala. 714; Guthrie v. Thompson, 1 Oregon, 353.

³ Ante, § 1232.

⁴ Hurley v. Brown, 98 Mass. 545, 546.

⁵ Gale v. Nixon, 6 Cow. 445. See Adams v. McMillan, 7 Port. 73; Newbery v. Wall, 65 N. Y. 484; Smith v. Jones, 66 Ga. 338.

⁶ Bill v. Bament, 9 M. & W. 36;

Webster v. Zielly, 52 Barb. 482; Bird v. Munroe, 66 Maine, 337.

⁷ Ante, § 1232; Washington Ice Co. v. Webster, 62 Maine, 341; Barry v. Law, 1 Cranch C. C. 77; Sanborn v. Sanborn, 7 Gray, 142; Brown v. Whipple, 58 N. H. 229.

⁸ Champlin v. Parish, 11 Paige, 405; Selby v. Selby, 3 Meriv. 2.

⁹ Ante, § 343-345.

¹⁰ Ante, § 347, 348.

¹¹ Drury v. Young, 58 Md. 546.

¹² Ogilvie v. Foljambe, 3 Meriv. 53.

¹³ Ante, § 1074, 1079, 1080, 1082;

§ 1245. **Lawfully authorized — (Auctioneer — Broker).** — We have seen who may be agents and how they are empowered.¹ Thus, an auctioneer is, within limits before pointed out, the agent of both parties to make the required memorandum.² But if an ordinary agent of the vendor makes it, he does not bind the purchaser, not being, like the auctioneer, his agent also.³ The auctioneer's authority as agent cannot be delegated to another;⁴ or, as to the signing, postponed to a future time.⁵

§ 1246. **Only One Party Signing.** — These contracts, like all other actual ones, require the mutual consent of the parties;⁶

Wiener v. Whipple, 53 Wis. 298; *Wharton v. Stoutenburgh*, 8 Stew. Ch. 266.

¹ Ante, § 1034–1110.

² Ante, § 1038, 1039.

³ *Bamber v. Savage*, 52 Wis. 110; *Farebrother v. Simmons*, 5 B. & Ald. 333. But not when he is employed simply to make the outcry, and use the hammer, while the owner stands by and in all other respects conducts the sale. *Adams v. Scales*, 1 Baxter, 337.

⁴ Ante, § 1134.

⁵ *Bamber v. Savage*, supra, at p. 113; *Jelks v. Barrett*, 52 Missis. 315; *Gwathney v. Cason*, 74 N. C. 5. In *Gill v. Bicknell*, 2 Cush. 355, 358, *Shaw, C. J.* explains the reason for this power of the auctioneer; thus, — "The true reason probably is, that a sale at auction, being open and visible and in presence of witnesses . . . closely watching the proceeding, there is less danger of fraud and perjury in proving the making and terms of the contract, and so the main reason for requiring a memorandum in writing does not exist. The technical ground is, that the purchaser, by the very act of bidding, connected with the usage and practice of auction sales, loudly and notoriously calls on the auctioneer or his clerk to put down his name as the bidder, and thus confers an authority on the auctioneer or clerk to sign his name, and this is the whole extent of the authority." The reader

perceives, that, so far as the bidder is concerned, this is the exact case mentioned at ante, § 345, of the name of the maker of an instrument being written "for him in his presence and at his request," when the execution becomes in law his personal act, the same as though done by his own hand. And this explains why the auctioneer cannot do it afterward in his absence. As to the vendor, the auctioneer is agent by virtue of his employment. A broker is in like manner the agent of both parties to make the memorandum. Ante, § 1038; *Coddington v. Goddard*, 16 Gray, 436; *Newberry v. Wall*, 84 N. Y. 576; *Merritt v. Clason*, 12 Johns. 102; *Grant v. Fletcher*, 5 B. & C. 436; *Henderson v. Barnewall*, 1 Y. & J. 387. The purchaser constitutes him such by buying of the principal through him as middle-man. And, in reason, it is not clear that this middle-man is precluded from making the memorandum after the act of sale and purchase is ended. Plainly the buyer at auction, by requesting the thing to be done in his presence, does not empower the auctioneer to do it afterward, in altered circumstances. The circumstances with the broker are not so much changed an hour after one has consented to buy. And there are various other differences. How the law really is as to brokers this is not the place further to inquire.

⁶ Ante, § 312 et seq.

but only the one to be charged need sign the memorandum, though commonly in practice both do.¹ Further as to its contents, —

§ 1247. **Consideration.** — To be binding, this contract, like any other, must proceed on a consideration.² But, in principle, if at common law a written contract need not express the consideration, which may be proved by oral evidence as already explained,³ the result seems to follow that the written memorandum under this statute need not mention it. Yet the English courts, reasoning from the particular statutory word “agreement,” require it to be expressed, or to be inferable from what is expressed;⁴ at the same time, under the section relating to the sale of goods, employing the word “contract” instead, they hold the memorandum which is silent as to the consideration sufficient.⁵ A part of our American tribunals follow this English interpretation, while others do not require the consideration to be expressed in any case; and the statutes of our States differ.⁶ So, for further explanations, the reader is referred to his own domestic books.

§ 1248. **As to Minds in Accord.** — Within the principle that, whether the contract is signed by both parties or only by the one to be bound, the two minds must come into accord,⁷ a memorandum in materially-differing parts, with nothing to indicate the true reading,⁸ will be inadequate.⁹ This is often

¹ *Reuss v. Picksley*, Law Rep. 1 Ex. 342; *Shirley v. Shirley*, 7 Blackf. 452; *Douglass v. Spears*, 2 Nott & McC. 207; *Morin v. Martz*, 13 Minn. 191; *McCrea v. Purmort*, 16 Wend. 460; *Davis v. Shields*, 26 Wend. 341; *Waul v. Kirkman*, 27 Missis. 823; *Justice v. Lang*, 42 N. Y. 493; *Hatton v. Gray*, 2 Cas. Ch. 164.

² *Tenney v. Prince*, 4 Pick. 385, 387.

³ *Ante*, § 75, 124, note, 275.

⁴ *Wain v. Warlters*, 5 East, 10; *Smith Con.* 2d Eng. ed. 41. See *Ex parte Gardom*, 15 Ves. 286.

⁵ *Egerton v. Mathews*, 6 East, 307; *Pollock Con.* 141.

⁶ *Steadman v. Guthrie*, 4 Met. Ky. 147; *Shively v. Black*, 9 Wright, Pa.

345; *Britton v. Angier*, 48 N. H. 420; *Bean v. Valle*, 2 Misso. 126; *Sorrell v. Jackson*, 30 Ga. 901; *Cummings v. Dennett*, 26 Maine, 397; *Lent v. Padelford*, 10 Mass. 230; *Sears v. Brink*, 3 Johns. 210; *Thompson v. Blanchard*, 3 Comst. 335; *Violett v. Patton*, 5 Cranch, 142; *Patmor v. Haggard*, 78 Ill. 607; *Bartlett v. Matson*, 1 Misso. Ap. 151; *Bolling v. Munchus*, 65 Ala. 558; *Thornburg v. Masten*, 88 N. C. 293; *Dahlman v. Hammel*, 45 Wis. 466; *Goodnow v. Bond*, 59 N. H. 150; *Thomas v. Hammond*, 47 Texas, 42.

⁷ *Ante*, § 1246; *Wharton v. Stoutenburgh*, 8 Stew. Ch. 266.

⁸ *Ante*, § 424.

⁹ *Grant v. Fletcher*, 5 B. & C. 436.

illustrated in bargainings by letter or telegram, where proposal and acceptance do not completely fit; there is then no sufficient memorandum.¹ Now, —

§ 1249. **Substantial Requisites.** — The form of the writing is immaterial. It may consist of letters, telegrams, entries in auctioneers' or brokers' books, an orderly-written contract, or otherwise, — on one piece of paper, or on more pieces than one, attached, or the one referring to the other,² — still it must contain in substance the complete agreement in terms sufficiently plain to be understood.³ But it is not objectionable though requiring, for its entire comprehension, those oral inquiries into surroundings and identifying matter,⁴ and those implications,⁵ which are admissible in interpreting ordinary contracts.⁶ Simply to state the fact of a bargain, where the terms rest in oral words, is not enough.⁷ Yet few words will often suffice; as, where a prior oral guarantor for "John" wrote, "Give John a little more time, and I will see that you get your money," he was held.⁸ And "cash on delivery" sufficiently indicates the terms of a sale of goods.⁹

¹ Ante, § 321-329; *Lincoln v. Erie Preserving Co.* 132 Mass. 129; *Hussey v. Horne-Payne*, 4 Ap. Cas. 311; *Smith v. Surman*, 9 B. & C. 561.

² Ante, § 382.

³ *Whelan v. Sullivan*, 102 Mass. 204; *McGuire v. Stevens*, 42 Missis. 724; *Riley v. Farnsworth*, 116 Mass. 223; *Lee v. Mahoney*, 9 Iowa, 344; *McConnell v. Brillhart*, 17 Ill. 354; *O'Donnell v. Leeman*, 43 Maine, 158; *Rhoades v. Castner*, 12 Allen, 130; *Bailey v. Ogden*, 3 Johns. 399; *Abeel v. Radcliff*, 13 Johns. 297; *Dodge v. Lean*, 13 Johns. 508; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Patterson v. Underwood*, 29 Ind. 607; *Boardman v. Spooner*, 13 Allen, 353; *Hazard v. Day*, 14 Allen, 487; *Wright v. Weeks*, 25 N. Y. 153; *Murdock v. Anderson*, 4 Jones, Eq. 77; *Ellis v. Deadman*, 4 Bibb, 466; *Horseley v. Graham*, Law Rep. 5 C. P. 9; *Sale v. Lambert*, Law Rep. 18 Eq. 1; *Potter v. Duffield*, Law Rep. 18 Eq. 4; *Commins v. Scott*, Law Rep. 20 Eq. 11; *Gault v. Stormont*, 51 Mich. 636; *Munday v. Asprey*, 13 Ch. D. 855; *McLean v. Nicoll*, 7 Jur. n. s. 999; *Oakman v. Rogers*, 120 Mass. 214; *Reid v. Kenworthy*, 25 Kan. 701; *Drury v. Young*, 58 Md. 546; *Newbery v. Wall*, 65 N. Y. 484; *Smith v. Jones*, 66 Ga. 338; *Cave v. Hastings*, 7 Q. B. D. 125; *Williams v. Robinson*, 73 Maine, 186; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78, 6 Jur. n. s. 1215.

⁴ Ante, § 370-378.

⁵ Ante, § 254.

⁶ *White v. Core*, 20 W. Va. 272; *Tice v. Freeman*, 30 Minn. 389; *Shardlow v. Cotterell*, 20 Ch. D. 90; *Beckwith v. Talbot*, 95 U. S. 289; *Eggleston v. Wagner*, 46 Mich. 610.

⁷ *McElroy v. Buck*, 35 Mich. 434; *Gault v. Stormont*, 51 Mich. 636; *Schroeder v. Taaffe*, 11 Misso. Ap. 267, 268. See *Ellis v. Bray*, 79 Misso. 227; *O'Neil v. Crain*, 67 Misso. 250; *Perrine v. Cooley*, 10 Vroom, 449.

⁸ *Wills v. Ross*, 77 Ind. 1.

⁹ *Justice v. Lang*, 42 N. Y. 493.

III. *Promises by Executors and Administrators.*

§ 1250. **Statutory Provision.** — The clause now to be explained is analogous to that treated of under our next subtitle; it relates to guaranty. It declares that, in the absence of the memorandum just described, “no action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate.”¹ In other words, to render him personally liable for a debt of the deceased, his promise to pay it must be in writing. Now, —

§ 1251. **Fresh Consideration.** — The statute does not impart to the written promise any vitality which it would not have had before if oral. Therefore, whether the memorandum must set out a consideration or not,² there must be such in fact. That by which the deceased person became holden will not suffice; to create this fresh obligation from the living, there must be a fresh consideration — one valid as to him.³ A familiar illustration of the fresh consideration is —

§ 1252. **Forbearance.** — If an executor, in consideration that a creditor will forbear for a time to press his claim against the estate, undertakes in writing to be personally responsible for it, the law will hold him, though not individually benefited, the other having parted with an advantage.⁴ And the like rule applies to a legacy.⁵

§ 1253. **Form of Promise.** — To bind him personally, the form of the undertaking must show this intent; a mere written promise as executor not being adequate. But he may be thus bound though he adds “executor” or “administrator” to his signature.⁶ For the court, in interpreting an instrument, looks at the whole of it, and is not often governed by a single

¹ Ante, § 1232.

² Ante, § 1247.

³ 1 Chit. Con. 11th Am. ed. 372; Forth v. Stanton, 1 Saund. Wms. ed. 210 and notes.

⁴ Ante, § 61-63; Jones v. Ashburnham, 4 East, 455.

⁵ Davis v. Reyner, 2 Lev. 3.

⁶ Treadwell v. Herndon, 41 Missis. 38; Winter v. Hite, 3 Iowa, 142; Lockwood v. Gilson, 12 Ohio State, 526; Stoudenmeier v. Williamson, 29 Ala. 558; Sieckman v. Allen, 3 E. D. Smith, 561.

word.¹ Thus, a promissory note in the following terms was adjudged to charge the makers personally: "As executors to the late, &c. we severally and jointly promise to pay, &c. the sum of, &c. on demand, together with lawful interest." Here were a contemplated forbearance, an undertaking to pay interest with which the estate was not chargeable, and a joint and several promise, — all obligations different from what the law casts on executors; hence a personal liability must have been meant.²

§ 1254. **Original Obligation.** — Executors and administrators, in the discharge of their duties, enter into various original obligations, as well as incur responsibilities for torts, which are personal in their inception; binding them, and not the estate, though sometimes they may charge over to the estate what they thus pay out. With these, the statute has nothing to do.³ A familiar illustration is where an executor, in consideration of the release of a claim against the estate, promises to pay it in person; no writing is required to hold him.⁴ But any mere verbal promise to pay a debt of the deceased while his estate remains liable is within the statute, and it will not bind the executor or administrator personally.⁵

§ 1255. **Further** — doctrines and illustrations, applicable under this sub-title, will be found in the next.

IV. *The Promise to answer for another's Debt, Default, or Miscarriage.*

§ 1256. **Statutory Terms.** — Within the statute is "any special promise to answer for the debt, default, or miscar-

¹ Ante, § 382-384, 404.

² Childs v. Monins, 2 Brod. & B. 460. And see Holderbaugh v. Turpin, 75 Ind. 84.

³ Tomlinson v. Gill, Amb. 330; Beaty v. Gingles, 8 Jones, N. C. 302; Williams v. Davis, 18 Wis. 115; Taylor v. Mygatt, 26 Conn. 184; Farrelly v. Ladd, 10 Allen, 127; Luscomb v. Ballard, 5 Gray, 403; McKay v. Royal, 7 Jones, N. C. 426; Bowman v. Tall-

man, 2 Rob. N. Y. 385; McGloin v. Vanderlip, 27 Texas, 366; Hackleman v. Miller, 4 Blackf. 322; Stebbins v. Smith, 4 Pick. 97.

⁴ Crawford v. King, 54 Ind. 6, a case within the principle, if not the exact terms, of the proposition. And see post, § 1258, 1261.

⁵ Smithwick v. Shepherd, 4 Jones, N. C. 196.

riages of another person.”¹ The provision is, therefore, like that explained in the last sub-title,² one of guaranty or suretyship. Hence, —

§ 1257. **Three Parties required.** — To constitute this sort of contract, there must be three parties; namely, a creditor, his debtor, and a person who guarantees to the former the latter's debt. Yet it does not follow that the three must act concurrently in creating the guaranty. Hence, —

§ 1258. **Principal Discharged.** — Because three parties are necessary, it is a mere truism to say that no contract lacking any one of them is within the statute. Therefore the doctrine is believed to be absolute and without exception, that, to render writing indispensable to the efficacy of a surety's promise, the principal must be and remain holden; that is, the debt must be due, not from the promisor, but from “another.” By reason whereof, any bargaining which discharges the principal takes the case out of the statute.³ On the other hand, —

§ 1259. **Principal remaining Holden.** — In general, any promise to pay another's indebtedness, which is not by the terms of the promise or other concurrent arrangement taken away, must, to avoid the bar of the statute, be in writing.⁴ But, as

¹ Ante, § 1232.

² Ante, § 1250.

³ *Mallet v. Bateman*, Law Rep. 1 C. P. 163; *Lakeman v. Mountstephen*, Law Rep. 7 H. L. 17, 24, 7 Q. B. 196, 5 Q. B. 613 (at the place first cited, Lord Selborne observing: “There can be no suretyship unless there be a principal debtor, . . . nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed”); *Eddy v. Roberts*, 17 Ill. 505; *Wainwright v. Straw*, 15 Vt. 215; *Mease v. Wagner*, 1 McCord, 395; *Bronson v. Stroud*, 2 McMullen, 372; *Hill v. Doughty*, 11 Ire. 195; *Connerat v. Goldsmith*, 6 Ga. 14; *Billingsley v. Dempewolf*, 11 Ind. 414; *Aldrich v. Jewell*, 12 Vt. 125; *Olive v. Lewis*, 45 Missis. 203; *Townsend v. Sumrall*, 2 Pet. 170, 181; *Floyd v. Harrison*, 4 Bibb,

76; *Wakefield v. Greenhood*, 29 Cal. 597; *Richardson v. Williams*, 49 Maine, 558; *Parker v. Barker*, 2 Met. 423; *Smith v. Montgomery*, 3 Texas, 199.

⁴ *Sweatman v. Parker*, 49 Missis. 19, 28, and *Bloom v. McGrath*, 53 Missis. 249, in which two cases the doctrine was put, it is believed, too strongly, thus, — “The only test and criterion by which to determine whether the promise needs to be in writing is the question whether it is or is not a promise to answer for a debt, default, or miscarriage of another, for which that other continues liable;” *Laidlow v. Hatch*, 75 Ill. 11; *Hayden v. Weldon*, 14 Vroom, 128; *Dee v. Downs*, 57 Iowa, 589; *Krutz v. Stewart*, 54 Ind. 178; *Dows v. Swett*, 120 Mass. 322; *Gower v. Stuart*, 40 Mich. 747; *In re Tozer's Estate*, 46 Mich. 299; *Richardson v. Robbins*, 124 Mass. 105.

we shall presently see,¹ there are cases in real or apparent exception to this rule; namely, where one orally contracts a debt of his own, the payment of which has the effect of paying another's; the statute does not extend to this sort of bargaining. In illustration and further exposition of these leading doctrines, —

§ 1260. **Goods bought.** — If A has goods which B wishes to buy, and X promises to pay for them, or to pay unless B does, then, in either case, if A delivers and deliberately charges them to B, whom he intends to hold, while he also holds X as surety, or thus deliberately charges them to the two jointly, still X is not liable unless his promise is in writing.² But if the promise of X is in such form that the charge may be made directly to him, and it is so made, and no claim is retained against B, then X may be compelled to pay though there is no writing.³ Again, —

§ 1261. **Existing Debt.** — If a debtor, creditor, and third person agree together, that the debtor shall be discharged and the creditor look to the third person for his pay, this arrangement is valid though not in writing; because the debt, in being cast upon the third person, is taken off from the "other." And the release of such other furnishes a consideration for the new promise.⁴ But if the old debt is not lifted, the new promise must be in writing, and a fresh consideration⁵ must be added.⁶

¹ Post, § 1263.

² *Matthews v. Milton*, 4 Yerg. 576; *Matson v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Bl. 120; *Jones v. Cooper*, Cowp. 227; *Hill v. Raymond*, 3 Allen, 540; *Swift v. Pierce*, 13 Allen, 136; *Searight v. Payne*, 2 Tenn. Ch. 175; *Pettit v. Braden*, 55 Ind. 201.

³ *Wallace v. Wortham*, 25 Missis. 119; *Graham v. O'Neil*, 2 Hall, 474; *Cahill v. Bigelow*, 18 Pick. 369; *Langdon v. Richardson*, 58 Iowa, 610; *Hartley v. Varner*, 88 Ill. 561; *McLendon v. Frost*, 57 Ga. 448; *Morrison v. Baker*, 81 N. C. 76; *Booth v. Heist*, 13 Norris, Pa. 177.

⁴ *Meriden Britannia Co. v. Zingsen*,

48 N. Y. 247; *Barringer v. Warden*, 12 Cal. 311; *Corbett v. Cochran*, 3 Hill, S. C. 41; *Day v. Cloe*, 4 Bush, 563; *Wood v. Corcoran*, 1 Allen, 405; *Warren v. Smith*, 24 Texas, 484; *Gleason v. Briggs*, 28 Vt. 135; *Watson v. Jacobs*, 29 Vt. 169; *Mead v. Keyes*, 4 E. D. Smith, 510; *Bill v. Barker*, 16 Gray, 62; *Thornton v. Guice*, 73 Ala. 321; *Borchsenius v. Canutson*, 100 Ill. 82.

⁵ Ante, § 1251.

⁶ *Beall v. Ridgeway*, 18 Ala. 117; *Comstock v. Breed*, 12 Cal. 286; *Cutler v. Everett*, 33 Maine, 201; *Aldridge v. Turner*, 1 Gill & J. 427; *Chaffee v. Thomas*, 7 Cow. 358; *Parker v. Carter*, 4 Munf. 273; *Stone v. Symmes*, 18

§ 1262. **Other Illustrations** — of the distinction are numerous. For example, after a physician has rendered services to a sick family, if a third person to whom he declines to do more without security for his pay verbally promises to be responsible, he may continue his visits, charging them directly to the latter; and he can collect of him pay for them, but not for the prior services.¹

§ 1263. **Own Debt.** — As already said,² the statute does not invalidate one's oral promise to pay his own debt, though in a form which will work the discharge of "another's." This doctrine is established beyond question; yet, in cases upon the border line distinguishing this class from the other, its application is sometimes difficult; and, it may be, the decisions are not absolutely harmonious.³ The mere fact that an advantage will accrue to the promisor from his suretyship does not take the bargaining out of the statute; but the true test appears to be, — Was the transaction in essence his own, while the securing of the third person's debt to the promisee was a mere collateral consequence, or was the latter its direct object?⁴ Some of the adjudged cases are a little confused in overlooking the distinction between the doctrine of this section and that of the next; namely, —

§ 1264. **Promise must be to Creditor, not to Debtor.** — In the foregoing illustrations, the promise was to the creditor. And no case in which it is not to him, or to some person representing him, is within the statute. If, therefore, one, on an adequate consideration, arranges with a debtor to pay what the latter owes generally, or what he owes a particular per-

Pick. 467; *Brown v. Hazen*, 11 Mich. 219; *Noyes v. Humphreys*, 11 Grat. 636; *Luce v. Zeile*, 53 Cal. 54; *Frame v. August*, 88 Ill. 424; *The State v. Shinn*, 13 Vroom, 138.

¹ *King v. Edmiston*, 88 Ill. 257; *Kessler v. Sonneborn*, 10 Daly, 383.

² Ante, § 1259.

³ *Taylor v. Preston*, 29 Smith, Pa. 436, 441; *Dows v. Swett*, 134 Mass. 140; *Darst v. Bates*, 51 Ill. 439; *Wilson v. Hentges*, 29 Minn. 102; *Clopper v. Poland*, 12 Neb. 69; *Hassinger v. New-*

man, 83 Ind. 124; *Eagle Mowing, &c. Co. v. Shattuck*, 53 Wis. 455; *Fitzgerald v. Morrissey*, 14 Neb. 198; *White v. Webster*, 58 Ind. 233.

⁴ *Clapp v. Webb*, 52 Wis. 638, 641; *Weisel v. Spence*, 59 Wis. 301; *Shaffer v. Ryan*, 84 Ind. 140; *Milks v. Rich*, 80 N. Y. 269; *Sheldon v. Butler*, 24 Minn. 513; *Mitchell v. Griffin*, 58 Ind. 559; *Mobile, &c. Railroad v. Jones*, 57 Ga. 198; *Conger v. Cotton*, 37 Ark. 286; *Fears v. Story*, 131 Mass. 47.

son, this is valid though not in writing. The debt is not "another's," but the very person's to whom the promise is made.¹ For example, a buyer who is to pay by discharging an indebtedness of the seller to a third person is altogether outside of the statute.² Another familiar example within the same doctrine is the —

§ 1265. **Promise of Indemnity.** — One's promise to another to see him harmless should he become surety for a third person, or should he do anything else, is a mere arrangement between promisor and promisee. It is to pay what the one to whom it is made may become liable for, — not "another's" debt, but his. Therefore it is not within the statute, and is valid though oral.³ Still some of the courts, instead of looking at the question so, regard the promise as an undertaking, in effect, to pay the third person's debt, or otherwise to answer

¹ *Eastwood v. Kenyon*, 11 A. & E. 438; *Hawes v. Woolcock*, 26 Wis. 629; *Britton v. Angier*, 48 N. H. 420; *Brown v. Brown*, 47 Misso. 130; *Barker v. Bradley*, 42 N. Y. 316; *Brown v. Strait*, 19 Ill. 88; *Presbyterian Society v. Staples*, 23 Conn. 544; *Colt v. Root*, 17 Mass. 229; *Tibbetts v. Flanders*, 18 N. H. 284; *Harwood v. Jones*, 10 Gill & J. 404; *Alger v. Scoville*, 1 Gray, 391; *Maxwell v. Haynes*, 41 Maine, 559; *Decker v. Shaffer*, 3 Ind. 187; *Howard v. Coshov*, 33 Misso. 118; *Kutzmeyer v. Ennis*, 3 Dutcher, 371; *Jennings v. Webster*, 7 Cow. 256; *Barker v. Bucklin*, 2 Denio, 45; *Meyer v. Hartman*, 72 Ill. 442; *Center v. McQuesten*, 18 Kan. 476; *Williams v. Rogers*, 14 Bush, 776.

² *Lee v. Newman*, 55 Missis. 365; *Morrison v. Hogue*, 49 Iowa, 574; *Crim v. Fitch*, 53 Ind. 214; *Vaughn v. Smith*, 58 Iowa, 553; *Wynn v. Wood*, 1 Out. Pa. 216; *Justice v. Tallman*, 5 Norris, Pa. 147.

³ *Aldrich v. Ames*, 9 Gray, 76; *Wildes v. Dudlow*, Law Rep. 19 Eq. 198; *Dunn v. West*, 5 B. Monr. 376; *Mills v. Brown*, 11 Iowa, 314; *Jones v. Shorter*, 1 Kelly, 294; *Lucas v. Chamberlain*, 8 B. Monr. 276; *Perley*

v. Spring, 12 Mass. 297; *Chapin v. Lapham*, 20 Pick. 467; *Holmes v. Knights*, 10 N. H. 175; *Harrison v. Sawtel*, 10 Johns. 242; *Chapin v. Merrill*, 4 Wend. 657; *Sanborn v. Merrill*, 41 Maine, 467; *Blount v. Hawkins*, 19 Ala. 100; *Wyman v. Smith*, 2 Sandf. 331; *Seaman v. Whitney*, 24 Wend. 260; *Perkins v. Littlefield*, 5 Allen, 370; *Flemm v. Whitmore*, 23 Misso. 430; *Prather v. Vineyard*, 4 Gilman, 40; *Stark v. Raney*, 18 Cal. 622; *Marcy v. Crawford*, 16 Conn. 549; *Bohannon v. Jones*, 30 Ga. 488; *Tindal v. Touchberry*, 3 Strob. 177; *Myers v. Morse*, 15 Johns. 425; *Conkey v. Hopkins*, 17 Johns. 113; *Beaman v. Russell*, 20 Vt. 205; *Walker v. Norton*, 29 Vt. 226; *Soule v. Albee*, 31 Vt. 142; *Dorwin v. Smith*, 35 Vt. 69; *Goodspeed v. Fuller*, 46 Maine, 141. More or less distinctly opposed to the text, and to the foregoing and many other like decisions, are *Kelsey v. Hibbs*, 13 Ohio State, 340; *Brush v. Carpenter*, 6 Ind. 78; *Draughan v. Bunting*, 9 Ire. 10; *Simpson v. Nance*, 1 Speer, 4; *Bissig v. Britton*, 59 Misso. 204; *Demeritt v. Bickford*, 58 N. H. 523; *Anderson v. Spence*, 72 Ind. 315.

for him ; holding it, therefore, to be within the statute.¹ On principle, this question is determinable by a very simple test. You promise James that, if he puts his name as surety for John on a bond running to Richard, you will hold him harmless ; he does it ; John makes default. All agree that, in this case, John is the “another” of the statute. But Richard, to whom the debt is due, cannot sue you ; John failing, his claim over is alone on James. Aside from difficulties as to the form of the action, your liability begins only when James has paid him. There remains now for adjustment only what you had promised to James, who is not “another,” but the promisee himself,—the debt is yours to him, and there is nothing going out from you to any third person. Hence the case is not within the statute.²

§ 1266. **Consideration.**—As explained in the last sub-title,³ the writing does not render a consideration the less necessary.⁴ Therefore a mere naked promise to pay an existing debt of a third person cannot be enforced, though in writing.⁵ If the contract of the surety is simultaneous with that of the principal, the consideration which supports the one will sustain also the other ; but, if subsequent, there must be some fresh consideration.⁶ Forbearance to sue, for example, is sufficient.⁷ So is the release of a remedy.⁸

¹ *Green v. Cresswell*, 10 A. & E. 453 ; *Easter v. White*, 12 Ohio State, 219 ; *Ferrell v. Maxwell*, 28 Ohio State, 383 ; *May v. Williams*, 61 Missis. 125 ; *Bissig v. Britton*, 59 Misso. 204. The other cases are pretty fully cited in these.

² Ante, § 1264.

³ Ante, § 1251, 1252.

⁴ *Thomas v. Delphy*, 33 Md. 373 ; *Barrell v. Trussell*, 4 Taunt. 117 ; *Seearce v. Gall*, 82 Ind. 255 ; *Frame v. August*, 88 Ill. 424.

⁵ *Starr v. Earle*, 43 Ind. 478 ; *Beall v. Ridgeway*, 18 Ala. 117 ; *Osborne v. Farmers Loan, &c. Co.* 16 Wis. 35.

⁶ *Bebee v. Moore*, 3 McLean, 387 ; *How v. Kembell*, 2 McLean, 103 ; *Colburn v. Tolles*, 14 Conn. 341 ; *Lines v.*

Smith, 4 Fla. 47 ; *Ware v. Adams*, 24 Maine, 177 ; *Gillighan v. Boardman*, 29 Maine, 79 ; *Cook v. Elliott*, 34 Misso. 586 ; *Brewster v. Silence*, 4 Selden, 207 ; *Snevily v. Johnston*, 1 Watts & S. 307.

⁷ Ante, § 1252 ; *Smith v. Finch*, 2 Scam. 321 ; *Martin v. Black*, 20 Ala. 309 ; *Sage v. Wilcox*, 6 Conn. 81 ; *Kean v. McKinsey*, 2 Barr, 30 ; *Thomas v. Croft*, 2 Rich. 113 ; *McCelvy v. Noble*, 13 Rich. 330 ; *King v. Upton*, 4 Greenl. 387 ; *Elting v. Vanderlyn*, 4 Johns. 237 ; *Vinal v. Richardson*, 13 Allen, 521.

⁸ Ante, § 1254, 1261 ; *Kershaw v. Whitaker*, 1 Brev. 9 ; *Killian v. Ashley*, 24 Ark. 511 ; *Taylor v. Meek*, 4 Blackf. 388 ; *Corbett v. Cochran*, 3 Hill, S. C. 41.

V. *The Agreement on Consideration of Marriage.*

§ 1267. **At Common Law — Under Statute.** — Marriage is, at the common law, an adequate consideration for a promise.¹ And the Statute of Frauds merely provides, that “any agreement made upon” this consideration shall, to be valid, be in writing.²

§ 1268. **Defined.** — A “consideration of marriage” is an actual marriage, in exchange for which the promise is made;³ as, —

§ 1269. **Marriage Settlement, &c.** — If a man settles property on a woman, upon the mutual understanding that thereupon she will marry him, which she does, this “consideration of marriage” renders the settlement valid even as against his creditors.⁴ And it is the same with his executory promise to settle property in the future, or any other promise which he makes to her or for her benefit, of a sort not to be extinguished by the marriage.⁵ But, by the Statute of Frauds, such promise must be in writing. Or, —

§ 1270. **By Third Person.** — A third person’s written and signed promise, made either to the woman or to the man, that, if they intermarry, he will thereon do a particular thing, binds him on fulfilment by them, being founded on the “consideration of marriage.”⁶ But, —

§ 1271. **Promise to Marry.** — A mere promise to marry is not of this sort. It is generally mutual, so that the undertaking of the one is the consideration for that of the other; but, whether in a particular case this is so or not, it is not a

¹ Ante, § 67.

² Ante, § 1232.

³ Ante, § 38.

⁴ 1 Bishop Mar. Women, § 777-784; Mountacue v. Maxwell, 1 Stra. 236; Potts v. Merrit, 14 B. Monr. 406; Finch v. Finch, 10 Ohio State, 501; Andrews v. Jones, 10 Ala. 400; Naill v. Maurer, 25 Md. 532; Pratt v. Wright, 5 Misso. 192; Woodward v. Woodward, 5 Sneed, Tenn. 49.

⁵ Rivers v. Thayer, 7 Rich. Eq. 136; Marshall v. Morris, 16 Ga. 368; Naill v. Maurer, supra; Miller v. Goodwin, 8 Gray, 542; Sullings v. Richmond, 5 Allen, 187; Tarbell v. Tarbell, 10 Allen, 278; Kimborough v. Davis, 1 Dev. Eq. 71; Boatright v. Wingate, 3 Brev. 423.

⁶ 1 Bishop Mar. Women, § 785-787; Ogden v. Ogden, 1 Bland, 284.

promise on "consideration of marriage,"¹ and it need not be in writing.²

VI. *Agreements not to be performed within a Year.*

§ 1272. **Statutory Provision.** — By another clause of the statute, any agreement must be in writing which "is not to be performed within the space of one year from the making thereof."³

§ 1273. **How Interpreted.** — Plainly the expression "is not to be performed" points to such affirmative terms in the contract as exclude performance within the year.⁴ Hence, —

§ 1274. **Doctrine defined.** — The doctrine of this sub-title is, that writing is essential when, under the terms of the agreement, the complete execution of it within a year from the time of the making is impossible; when, possibly, however improbably, all may transpire within the year, oral words will suffice: as, if performance depends on the death of a person, or the coming in of a ship, or any other contingent event which may or may not transpire within the year, no writing is required; otherwise, if there is a fixed date, set forward more than a year.⁵ Thus, —

¹ Ante, § 76-79; *Standiford v. Gentry*, 32 Misso. 477; *Espy v. Jones*, 37 Ala. 379; *Allard v. Smith*, 2 Met. Ky. 297.

² *Cork v. Baker*, 1 Stra. 34; *Harrison v. Cage*, 1 Ld. Raym. 386; *Clark v. Pendleton*, 20 Conn. 495; *Ogden v. Ogden*, 1 Bland, 284; *Blackburn v. Mann*, 85 Ill. 222.

³ Ante, § 1232.

⁴ "The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed." *Denison, J. in Fenton v. Emblers*, 3 Bur. 1278. 1281.

⁵ *Souch v. Strawbridge*, 2 C. B. 808; *Knowlman v. Bluett*, Law Rep. 9 Ex. 1; *Russell v. Slade*, 12 Conn. 455; *Burney v. Ball*, 24 Ga. 505; *Wiggins v. Keizer*, 6 Ind. 252; *Ellicott v. Turner*, 4 Md.

476; *Peters v. Westborough*, 19 Pick. 364; *Soggins v. Heard*, 31 Missis. 426; *Foster v. McO'Blenis*, 18 Misso. 88; *Suggett v. Cason*, 26 Misso. 221; *Blanding v. Sargent*, 33 N. H. 239; *Esty v. Aldrich*, 46 N. H. 127; *Moore v. Fox*, 10 Johns. 244; *Lockwood v. Barnes*, 3 Hill, N. Y. 128; *Broadwell v. Getman*, 2 Denio, 87; *Gadsden v. Lance*, 1 McM. Eq. 87; *Izard v. Middleton*, 1 Des. 116; *Thompson v. Gordon*, 3 Strob. 196; *Thouvenin v. Lea*, 26 Texas, 612; *Sherman v. Champlain Transp. Co.* 31 Vt. 162; *Blanchard v. Weeks*, 34 Vt. 589; *Rogers v. Brightman*, 10 Wis. 55; *White v. Hanchett*, 21 Wis. 415; *Packet Co. v. Sickles*, 5 Wal. 580; *Harris v. Porter*, 2 Harring. Del. 27; *Comstock v. Ward*, 22 Ill. 248; *Herrin v. Butters*, 20 Maine, 119; *Summerall v. Thoms*, 3 Fla. 298; *Shipley v. Patton*, 21 Ind.

§ 1275. **Agreement to marry.** — An agreement in general words to marry, or to marry within three years, need not be in writing, because it can be fulfilled within a year;¹ but a promise to marry after the lapse of a year is voidable if oral.² Again, —

§ 1276. **Ante-nuptial Contracts.** — Most ante-nuptial contracts are founded on the consideration of marriage, the clause as to which is explained in our last sub-title; by reason whereof they must be in writing. But such a contract not on this consideration, so outside of that clause, if it directs how property shall be disposed of to heirs, is not by the present clause forbidden to be oral; since the parties may marry and die within a year.³ And —

§ 1277. **Support during Life.** — An undertaking to support one during his life need not be in writing, for he may die before the year is ended.⁴ So —

§ 1278. **Other Things during Life.** — A promise to work for one while he lives,⁵ or any agreement to be performed at the death of one,⁶ may be oral; because the death may transpire within a year. In like manner, —

§ 1279. **By Will.** — A promise to pay by bequest,⁷ for services or anything else,⁸ is good though oral; because the promisor may not live a year.⁹ Once more, —

169; *Holbrook v. Armstrong*, 1 Fairf. 31; *First Baptist Church v. Brooklyn Fire Ins. Co.* 19 N. Y. 305; *Sutphen v. Sutphen*, 30 Kan. 510; *Jordan v. Miller*, 75 Va. 442; *McPherson v. Cox*, 96 U. S. 404; *Walker v. Johnson*, 96 U. S. 424; *Duff v. Snider*, 54 Missis. 245; *Blakeney v. Goode*, 30 Ohio State, 350; *Thomas v. Hammond*, 47 Texas, 42; *Groves v. Cook*, 88 Ind. 169; *Chaffe v. Benoit*, 60 Missis. 34.

¹ *Paris v. Strong*, 51 Ind. 339; *Withers v. Richardson*, 5 T. B. Monr. 94.

² *Nichols v. Weaver*, 7 Kan. 373; *Derby v. Phelps*, 2 N. H. 515.

³ *Houghton v. Houghton*, 14 Ind. 505. Within the same principle, see *Hill v. Jamieson*, 16 Ind. 125; *Richardson v. Pierce*, 7 R. I. 330; *Lyon v. King*, 11 Met. 411; *Worthy v. Jones*, 11

Gray, 168; *Doyle v. Dixon*, 97 Mass. 208.

⁴ *Bull v. McCrea*, 8 B. Monr. 422; *Howard v. Burgen*, 4 Dana, 137; *Hutchinson v. Hutchinson*, 46 Maine, 154; *Dresser v. Dresser*, 35 Barb. 573; *McCormick v. Drummatt*, 9 Neb. 384. But see the argument of counsel and authorities cited in *Knowlman v. Bluett*, Law Rep. 9 Ex. 1, 3. For a somewhat curious case, see *Deaton v. Tennessee Coal, &c. Railroad*, 12 Heisk. 650.

⁵ *Udike v. Ten Broeck*, 3 Vroom, 105.

⁶ *Frost v. Tarr*, 53 Ind. 390.

⁷ Ante, § 224.

⁸ *Fenton v. Emblers*, 3 Bur. 1278, 1 W. Bl. 353; *Ridley v. Ridley*, 34 Beav. 478.

⁹ *Jilson v. Gilbert*, 26 Wis. 637.

§ 1280. **Other Labor Bargainings.** — Where the words of a bargain were, “If I buy this mill from Mr. P., I will employ you to take charge of it for a year,” &c., — a case in which the purchase, consequently the commencement of the services, might, however improbably, occur instantly, — writing was held not to be necessary.¹ And it was the same of an agreement to construct a road within a year and twenty days; for there was no impossibility of finishing it within a year.² But a contract for a year’s services, to be entered upon in the future, even the next day, must be in writing;³ and so must be any contract by the terms of which the services will necessarily extend, for however brief a time — even, said Lord Ellenborough, “one minute”⁴ — beyond a year from its making.⁵ And one’s agreement to work for another more than a year, yet to be paid at intervals of less, cannot, if not in writing, be enforced as to any part of the services, or for the recovery of damages for the non-performance.⁶ But —

§ 1281. **While in Employ.** — An undertaking to work for one while a particular agent is in his employ is not within the statute; for, before the year closes, the agent may cease to serve.⁷

§ 1282. **“Reasonable Time” — Lawsuit.** — Neither a “reasonable time”⁸ nor a lawsuit⁹ necessarily extends beyond a year, therefore a contract bounded by either need not be in writing.

§ 1283. **Executed on One Side.** — In connection with this

¹ *Cole v. Singerly*, 60 Md. 348.

² *Jones v. Ponch*, 41 Ohio State, 146.

³ *Blanck v. Littell*, 9 Daly, 268; *Sutcliffe v. Atlantic Mills*, 13 R. I. 480; *Bracegirdle v. Heald*, 1 B. & Ald. 722.

⁴ *Bracegirdle v. Heald*, *supra*, at p. 726.

⁵ *Kelly v. Terrell*, 26 Ga. 551; *Scoggin v. Blackwell*, 36 Ala. 351; *Nones v. Homer*, 2 Hilton, 116; *Am-burger v. Marvin*, 4 E. D. Smith, 393; *Little v. Wilson*, 4 E. D. Smith, 422; *Squire v. Whipple*, 1 Vt. 69; *Hinckley v. Southgate*, 11 Vt. 428; *Pitcher v. Wilson*, 5 Misso. 46; *Drummond v.*

Burrell, 13 Wend. 307; *Treadway v. Smith*, 56 Ala. 345; *Levison v. Stix*, 10 Daly, 229; *Bernier v. Cabot Manuf. Co.* 71 Maine, 506.

⁶ *Emery v. Smith*, 46 N. H. 151; *Tuttle v. Swett*, 31 Maine, 555; *Hill v. Hooper*, 1 Gray, 131; *Giraud v. Richmond*, 2 C. B. 835. On the same principle, see *Holloway v. Hampton*, 4 B. Monr. 415.

⁷ *Roberts v. Rockbottom Co.* 7 Met. 46.

⁸ *Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590.

⁹ *Heflin v. Milton*, 69 Ala. 354; *Derrick v. Brown*, 66 Ala. 162.

section, the reader should refer back to the second sub-title. Where services have been rendered, or goods or lands delivered, under an oral contract, which, by this clause, ought to have been in writing, the party benefited must pay for them.¹ All, it is believed, admit this proposition; but there may be differences of opinion as to the reasons for it, and the form of the action. Some courts assert that the statute does not extend to contracts which have been performed on one side.² Yet the statutory terms³ and the analogous adjudications⁴ appear to forbid this interpretation; nor do the ends of justice require it. The true view is believed to be, that, to employ the very words of the statute, "no action shall be brought whereby to charge any" defendant "upon any agreement that is not to be performed within" the year, unless it is in writing, whether the plaintiff has done his part or not (for, in any case, if he is in default how can he sue?);⁵ yet, since the oral promise is voidable,⁶ if the party does avoid it, the law may and does create a promise from the voluntary recipient of benefits to pay for them.⁷

§ 1284. **Oral, performed after Year.**—If an oral contract is good on the ground that performance is possible within the year, yet when the year ends it is not done, it remains good the same as though this statute did not exist.⁸ For example, where one for a valuable consideration agreed verbally to leave a certain sum to another by will, but did not die until fourteen years later, his estate was held to be bound thereby.⁹

¹ *Montague v. Garnett*, 3 Bush, 297; *Harwood v. Jones*, 10 Gill & J. 404; *Hill v. Smith*, 12 Rich. 698; *Tatterson v. Suffolk Manuf. Co.* 106 Mass. 56; *Donellan v. Read*, 3 B. & Ad. 899; *Berry v. Doremus*, 1 Vroom, 399; *Jilson v. Gilbert*, 26 Wis. 637.

² *Smalley v. Greene*, 52 Iowa, 241; *Cherry v. Heming*, 4 Exch. 631; *Smith v. Neale*, 2 C. B. N. S. 67, 3 Jur. N. S. 516; *McClellan v. Sanford*, 26 Wis. 595. *Contra*, *Marcy v. Marcy*, 9 Allen, 8.

³ *Ante*, § 1232.

⁴ *Ante*, § 1235.

⁵ *Marcy v. Marcy*, *supra*; *Sheehy v. Adarene*, 41 Vt. 541.

⁶ *Stout v. Ennis*, 28 Kan. 706.

⁷ *Ante*, § 188, 217; *Towsley v. Moore*, 30 Ohio State, 184; *King v. Welcome*, 5 Gray, 41; *Compton v. Martin*, 5 Rich. 14; *Swanzy v. Moore*, 22 Ill. 63.

⁸ *Larimer v. Kelley*, 10 Kan. 298.

⁹ *Ridley v. Ridley*, 34 Beav. 478, 11 Jur. N. S. 475; *Jilson v. Gilbert*, 26 Wis. 637.

§ 1285. *The Doctrine of this Chapter restated.*

The Statute of Frauds, in the section explained in this chapter, has no relation to contracts which are executed on both sides. Its words are, "No action shall be brought," &c.;¹ leaving, to follow an oral bargaining, every consequence which does not require a suit.² When, therefore, the thing agreed is done, so that there is no occasion for an "action," the case is not within the statute. Or if one, pursuant to an oral promise which by the statute should be in writing, does the thing promised, such doing will, as a consideration, support another oral or written undertaking. But no action will lie on an oral promise within the statute, whatever the nature of the consideration, and though it has been paid or performed. Once more, the statute does not abrogate anything in the common law of contracts; it merely provides, that, in some cases, for the purposes of a suit, common-law requisites shall be reduced to writing. Consequently, though a contract is in writing, and complies with all the statutory demands, it will be invalid if it would have been so before the statute came. Finally, the statute extends only to the agreements which the parties make, not to those which the law creates.³

Such is the general doctrine, running through the entire section. Descending to the specific clauses, it is believed that no appended statement can make plainer what is laid down in the foregoing expositions. One clause of this fourth section remains for elucidation in our next chapter.

¹ Ante, § 1232.² *Stout v. Ennis*, 28 Kan. 706.³ Ante, § 193.

CHAPTER XLIX.

BARGAININGS RELATING TO REAL ESTATE.

§ 1286. **Words of Statute.** — This chapter is upon the same section of the Statute of Frauds which, as to its general interpretation, and its several clauses except one, was expounded in the last. The one clause, which remains for this place, provides that “no action shall be brought whereby to charge . . . any person . . . upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them,”¹ unless reduced to the writing in the last chapter explained.²

§ 1287. **Concerning Subject.** — The subject of vendors and purchasers, to which this section of the statute pertains, occupies a large space in the law. And it has many questions upon which the authorities are discordant. It cannot be fully discussed within the space allotted to this chapter; still, —

§ 1288. **What for Chapter.** — We shall here take such a view of the subject as will enable the reader to discern the true doctrine on various disputed questions; and, after leaving these pages, to enter upon its wider study in the cases and special text-books with an enlightenment which, it is hoped, will render easier and plainer his path to the end.

§ 1289. **Deed distinguished — (Seal).** — The deed, which transmits the legal title to land,³ is, aside from any questions connected with this statute, required to be in writing, and made solemn by the seal of the grantor.⁴ It is not for expo-

¹ Ante, § 1232; *Hairston v. Jandon*, 42 Missis. 380; *Lumpkin v. Johnson*, 27 Ga. 485.

² Ante, § 124, 277, 309, 355, 361, 363, 394–396, 399, 408.

⁴ Post, § 1327.

² Ante, § 1242–1249.

sition in this chapter, which concerns only the executory agreement to convey, and other like bargainings as to land. This executory contract need not be under seal.¹

§ 1290. **What Contracts — (Meaning of Statute).** — From the statutory expression, “any contract or sale,”² we may reject the word “sale;” because a sale is a contract, and the larger includes the less. The word “of,” in this clause, signifies relating to. Therefore the “contract” which must be in writing is “any” one relating to “lands, tenements, or hereditaments, or any interest in or concerning them.” The expression “lands, tenements, or hereditaments” includes everything inheritable, — all real estate, in the largest signification of the term.³ And the phrase “any interest in or concerning them” is still broader.⁴ Briefly, then, “any contract” relating to “any interest in or concerning” real property must, to be enforceable by “action,” be in writing. Now, —

§ 1291. **“Interest in or concerning” Realty — Further as to.** — Plain as is ordinarily the distinction between real and personal property, the question is often a nice one whether or not, within this statute, a particular thing is an “interest in or concerning” what is obviously real estate. Again, under the doctrine that this statute does not extend to executed contracts,⁵ and the further doctrine that its relation is only partial to those which are executed on one side,⁶ and the yet nicer rules of estoppel *in pais* in their application to contracts within this section,⁷ we have complications sometimes overlooked in the cases, and often of necessity requiring the courts to draw nice distinctions. The consequence is, that the adjudications on this class of questions appear to be much in conflict; and, in reality, they are not a little so. Let us, at every step of our further progress, keep these distinctions in mind.

¹ *Wheeler v. Newton*, Prec. Ch. 16; *Martin v. Weyman*, 26 Texas, 460; *Worrall v. Munn*, 1 Selden, 229.

² Ante, § 1286.

³ 2 Bl. Com. 16, 17.

⁴ These words are not in the Texas statute, under which, therefore, many

things may be orally done which in England and most of the other States require writing. *Anderson v. Powers*, 59 Texas, 213.

⁵ Ante, § 1234.

⁶ Ante, § 1235.

⁷ Ante, § 1236, 1237.

In a general way, —

§ 1292. **Doctrine defined.** — The “interest in or concerning” the realty, contemplated by this statute, may be defined as not only including what is obviously real estate, but also as extending to every sort of legal or equitable ownership, however slight, in whatever is deemed real property, whether at law or in equity; requiring every contract relating thereto, of whatever nature, to be in writing; while, on the other hand, a license or agreement to do anything on, with, or about the realty need not be so, where no interest other than personal is to pass to the party.¹ No possible defining, in general terms, could clear the question of every difficulty. Nor does this. Thus, —

§ 1293. **Realty becoming Personalty.** — If one sells something which to him is real estate, to another in whose hands it will be personalty, is the bargain within the statute? The

¹ No legal definition can be the subject of direct adjudication. Ante, § 184, note, 217, note, 369. This definition, therefore, was never directly adjudged. Like other legal doctrine, it depends upon a just consideration of the combined decisions, statutes, and reasons. Consult, among such other cases as the reader may have access to, the following: *Angell v. Duke*, Law Rep. 10 Q. B. 174; *Sanderson v. Graves*, Law Rep. 10 Ex. 234; *Davis v. Walker*, 4 Hayw. 295; *Pitman v. Poor*, 38 Maine, 237; *Love v. Cobb*, 63 N. C. 324; *Riddle v. Brown*, 20 Ala. 412; *Copper Hill Mining Co. v. Spencer*, 25 Cal. 18; *Bowman v. Conn*, 8 Ind. 58; *Scoggin v. Slater*, 22 Ala. 687; *Rhodes v. Otis*, 33 Ala. 578; *Gore v. McBrayer*, 18 Cal. 582; *Bostwick v. Leach*, 3 Day, 476; *Frear v. Hardenbergh*, 5 Johns. 272; *Onderdonk v. Lord, Hill & D.* 129; *Howard v. Easton*, 7 Johns. 205; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Finch v. Finch*, 10 Ohio State, 501; *Hogg v. Wilkins*, 1 Grant, Pa. 67; *Richards v. Richards*, 9 Gray, 313; *Barnet v. Dougherty*, 8 Casey, Pa. 371; *Trammell v. Trammell*, 11 Rich. 471;

Carroway v. Anderson, 1 Humph. 61; *May v. Baskin*, 12 Sm. & M. 428; *Buck v. Pickwell*, 27 Vt. 157; *Barnard v. Whipple*, 29 Vt. 401; *Bliss v. Thompson*, 4 Mass. 488, 491; *Cook v. Stearns*, 11 Mass. 533; *Hall v. McLeod*, 2 Met. Ky. 98; *Wright v. De Groff*, 14 Mich. 164; *Folsom v. Great Falls Manuf. Co.* 9 N. H. 355; *New Orleans, &c. Railroad v. Moye*, 39 Missis. 374; *Keyser v. School District*, 35 N. H. 477; *Fisher v. Fields*, 10 Johns. 495; *Benedict v. Beebee*, 11 Johns. 145; *Smith v. Burnham*, 3 Sumner, 435; *Henley v. Brown*, 1 Stew. 144; *Chambliss v. Smith*, 30 Ala. 366; *Hammond v. Cadwallader*, 29 Misso. 166; *Graves v. Graves*, 45 N. H. 323; *Newnan v. Carroll*, 3 Yerg. 18; *Ledford v. Ferrell*, 12 Ire. 285; *Bryant v. Hendricks*, 5 Iowa, 256; *Bannon v. Bean*, 9 Iowa, 395; *Owen v. Estes*, 5 Mass. 330; *Bruce v. Hastings*, 41 Vt. 380; *James v. Drake*, 39 Texas, 143; *White v. Butt*, 32 Iowa, 335; *Gould v. Mansfield*, 103 Mass. 408; *Copeland v. Wading River Reservoir*, 105 Mass. 397; *Thayer v. Rock*, 13 Wend. 53; *Detroit, &c. Railroad v. Forbes*, 30 Mich. 165.

distinction in reason, and, on the whole, upon the conflicting authorities, appears to be, that, if the seller is to sever the thing from the land and deliver it, the contract may be oral; but, if the buyer is to sever it and take it away, the case is within the statute and there must be writing. In the one instance, the thing sold is personalty; in the other, it is realty. Thus, —

§ 1294. **Trees — (Fruit).** — Following what is believed to be the better opinion, standing trees are real estate; therefore a contract for any interest in them while they remain standing — as, where one purchases them to be removed at his discretion,¹ or buys a certain number of cords of wood “standing in the tree”² — must be in writing.³ And it is the same of a sale of growing fruit, which is a part of the trees.⁴ But it is plainly otherwise where the owner has severed or is to sever the fruit from the trees or the trees from the soil, and he passes them over to the purchaser as apples, wood, or lumber. It is otherwise, also, where one bargains with the owner of the soil to cut the trees into wood, and deliver it to such owner at so much a cord. This is but an ordinary labor contract.⁵ Again, —

§ 1295. **Ore and Coal** — are personal property when severed from the soil. But a mining right, whereby one not an owner of the land is to dig and carry them away as his own, pertains to the realty, and it can be conferred only by writing.⁶ On the other hand, —

¹ *Bowers v. Bowers*, 14 Norris, Pa. 477, following *Pattison's Appeal*, 11 Smith, Pa. 294.

² *Knox v. Haralson*, 2 Tenn. Ch. 232, 237. Contra, *Green v. North Carolina Railroad*, 73 N. C. 524.

³ Ante, § 396; *Owens v. Lewis*, 46 Ind. 488; *Cool v. Peters Box, &c. Co.* 87 Ind. 531; *Buck v. Pickwell*, 27 Vt. 157; *Hutchins v. King*, 1 Wal. 53; *Olmstead v. Niles*, 7 N. H. 522; *Kingsley v. Holbrook*, 45 N. H. 313; *Green v. Armstrong*, 1 Denio, 550; *McGregor v. Brown*, 6 Selden, 114; *Harrell v. Miller*, 35 Missis. 700; *Yeakle v. Jacob*, 9 Ca-

sey, Pa. 376; *Slocum v. Seymour*, 7 Vroom, 138. But see *Byassee v. Reese*, 4 Met. Ky. 372; *Cain v. McGuire*, 13 B. Monr. 340; *Whitmarsh v. Walker*, 1 Met. 313; *Clafin v. Carpenter*, 4 Met. 580; *Nettleton v. Sikes*, 8 Met. 34.

⁴ *Rodwell v. Phillips*, 9 M. & W. 501.

⁵ *Killmore v. Howlett*, 48 N. Y. 569. See *Sterling v. Baldwin*, 42 Vt. 306; *Forbes v. Hamilton*, 2 Tyler, 356; *Freeman v. Headley*, 4 Vroom, 523.

⁶ *Riddle v. Brown*, 20 Ala. 412; *Lear v. Chouteau*, 23 Ill. 39; *Copper Hill Mining Co. v. Spencer*, 25 Cal. 18; *Melton v. Lambard*, 51 Cal. 258.

§ 1296. **Growing Crops**, — though not severed, are commonly regarded, under this statute, contrary to the rule in larceny,¹ as goods and chattels, to be bargained about simply as such.² In strict reason, the distinction we are considering should apply to them; so that, if the owner is first to sever them and then to deliver them to the purchaser as chattels, they are not within the statute; but are within it, if the buyer is to come upon the ground and himself detach them from the soil and carry them off. And we find in the books a few cases more or less leaning this way.³ Still, on the whole, as to annual crops, the direct product of labor, the exception of deeming them personalty for most civil purposes, even while attached to the soil, is probably established too firmly in authority to be overthrown. But —

§ 1297. **Grass**, — being a permanent product of the soil, is commonly regarded the same as trees; so that a transfer of it, to one who is to cut and remove it, must be in writing.⁴

§ 1298. **Right of Way**. — A right of way over one's land concerns the realty, and it cannot be orally granted.⁵ But —

§ 1299. **License**. — A mere license to ride or walk over land, or to do something else upon it, or both, is a different thing.⁶ In the words of Parker, C. J., “a license is technically an authority given to do some one act, or a series of acts, on the land of another, without passing any estate in the land; such as a license to hunt in another's land, or to cut down a certain number of trees.” And its validity, it being executed before it is withdrawn, is derivable from the principle that one cannot complain of what another has done with his consent.⁷ Obviously, therefore, this license has no relation

¹ 2 Bishop Crim. Law, § 763.

² *Green v. Armstrong*, 1 Denio, 550, 554; *Austin v. Sawyer*, 9 Cow. 39; *Evans v. Roberts*, 5 B. & C. 829; *Parker v. Staniland*, 11 East, 362; *Warwick v. Monteith*, 2 M. & S. 205; *Sainsbury v. Matthews*, 4 M. & W. 343; *Jones v. Flint*, 10 A. & E. 753; *Marshall v. Ferguson*, 23 Cal. 65; *Bricker v. Hughes*, 4 Ind. 146; *Matlock v. Fry*, 15 Ind. 483; *Bryant v. Crosby*, 40 Maine, 9.

³ *Emmerson v. Heelis*, 2 Taunt. 38; *Bowman v. Conn*, 8 Ind. 58.

⁴ *Crosby v. Wadsworth*, 6 East, 602; *Carrington v. Roots*, 2 M. & W. 248; *Jones v. Flint*, 10 A. & E. 753, 760.

⁵ *Hall v. McLeod*, 2 Met. Ky. 98; *Dillion v. Crook*, 11 Bush, 321; *Cook v. Stearns*, 11 Mass. 533; *Powers v. Clarkson*, 17 Kan. 218.

⁶ *Marston v. Gale*, 4 Fost. N. H. 176.

⁷ *Cook v. Stearns*, 11 Mass. 533, 537;

to the requirements of the statute; and, though under it the licensee may carry off the soil or ore or trees, or do other things deeply affecting the realty, it need not be in writing.¹ Though oral, it will furnish a perfect defence for all acts done under it.² Being presumed to proceed on a personal confidence, it is not assignable.³ And, when not coupled with an interest, it may be withdrawn at pleasure.⁴ But, —

§ 1300. **Coupled with Interest.** — When a valuable consideration has been paid for the oral license, or it has been acted upon, the doctrine of estoppel and that relating to the executed contract⁵ may, or not, according to the circumstances, preclude a withdrawal of such license.⁶ Thus, to follow a distinction believed to be sound,⁷ if one buys of another goods lying on the seller's land with leave to take them away, the license is irrevocable;⁸ because, under the law of estoppel,⁹ the seller will defraud the buyer should he be permitted to cut him off from taking the goods.¹⁰ But, if the thing sold by parol is a standing tree or a growing crop of grass¹¹ which, both parties being presumed to know the law, they are aware is not transferable except by writing, the license is revocable though a consideration has been paid for it; since, in this case, unlike the other, the thing purporting to be sold is not sold in fact.¹² There are multitudes of cases within this distinction, some of which are cited in the note;¹³ but it is not

Mumford v. Whitney, 15 Wend. 380, 390; Walter v. Post, 6 Duer, 363.

¹ Ante, § 396; Harmon v. Harmon, 61 Maine, 222; Greeley v. Stilson, 27 Mich. 153.

² Lockhart v. Geir, 54 Wis. 133; Smart v. Jones, 15 C. B. N. S. 717; Clinton v. McKenzie, 5 Strob. 36; Cool v. Peters Box, &c. Co. 87 Ind. 531.

³ Dark v. Johnston, 5 Smith, Pa. 164; Mendenhall v. Klinck, 51 N. Y. 246.

⁴ Wood v. Leadbitter, 13 M. & W. 838, 845, 854; Rex v. Horndon-on-the-Hill, 4 M. & S. 562; Batchelder v. Hibbard, 58 N. H. 269; Allen v. Fiske, 42 Vt. 462; Miller v. The State, 39 Ind. 267; Kivett v. McKeithan, 90 N. C. 106.

⁵ Ante, § 1234-1237, and places there referred to.

⁶ Clute v. Carr, 20 Wis. 531; Wood v. Leadbitter, 13 M. & W. 838, 845.

⁷ Leake Con. 252.

⁸ Wood v. Manley, 11 A. & E. 34; Heath v. Randall, 4 Cush. 195.

⁹ Lane v. Miller, 27 Ind. 534.

¹⁰ Ante, § 284-286.

¹¹ Ante, § 1297.

¹² Crosby v. Wadsworth, 6 East, 602; Carrington v. Roots, 2 M. & W. 248; Giles v. Simonds, 15 Gray, 441; Drake v. Wells, 11 Allen, 141; Dodge v. McClintock, 47 N. H. 383; Chandler v. Spear, 22 Vt. 388. I have not inquired how far the reasoning in these cases corresponds to the reasoning which the form of the discussion required me to employ in the text.

¹³ Mumford v. Whitney, 15 Wend.

deemed necessary to detain the reader with their details. They are believed to be not absolutely and in all particulars harmonious with one another.

§ 1301. **License in Writing.** — Except as stated in the last section, an irreversible license affecting the realty must be in writing.¹ Or, otherwise expressed, while an oral license does not necessarily relate to an “interest in or concerning” land, it may and often does; and then, if not made good by estoppel or by voluntary fulfilment, it will be voidable.²

§ 1302. **Tenancy at Will — (Lodging Rooms).** — Under a prior section of this Statute of Frauds,³ a tenancy at will — which is a sort of interest in land — may be created without writing, where the tenant actually enters by permission;⁴ but, under this fourth section, there can be no valid oral agreement for such tenancy, not accompanied by possession.⁵ Even for the occupancy of a particular lodging-room in a house, the contract, to bind the parties, must be in writing;⁶ but, for board and lodgings generally in the house, it need not be.⁷

§ 1303. **Collateral Bargainings.** — There are various collateral bargainings, having a more or less direct relation to real estate, not within the statute. Such, for example, is an

380; *Cook v. Stearns*, 11 Mass. 533; *Hodgson v. Jeffries*, 52 Ind. 334; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Fuhr v. Dean*, 26 Misso. 116; *Lee v. McLeod*, 12 Nev. 280; *Taylor v. Gerrish*, 59 N. H. 569; *Miller v. The State*, 39 Ind. 267; *Cook v. Pridgen*, 45 Ga. 331; *Kamphouse v. Gaffner*, 73 Ill. 453; *Thompson v. McElarney*, 1 Norris, Pa. 174; *Williamson v. Yingling*, 93 Ind. 42; *Johnson v. Skillman*, 29 Minn. 95; *United States v. Baltimore, &c. Railroad*, 1 Hughes, 138; *Hamilton, &c. Hydraulic Co. v. Cincinnati, &c. Railroad*, 29 Ohio State, 341; *Wingard v. Tift*, 24 Ga. 179; *Owen v. Field*, 12 Allen, 457.

¹ *Selden v. Delaware, &c. Canal*, 29 N. Y. 634; *Houghtaling v. Houghtaling*, 5 Barb. 379.

² 1 Chit. Con. 11th Am. ed. 418; *Houston v. Laffee*, 46 N. H. 505.

³ 29 Car. 2, c. 3, § 1.

⁴ *Withers v. Larrabee*, 48 Maine, 570; *Ellis v. Paige*, 1 Pick. 43; *Hingham v. Sprague*, 15 Pick. 102; *Mhoon v. Drizzle*, 3 Dev. 414; *Clark v. Smith*, 1 Casey, Pa. 137.

⁵ *McMullen v. Riley*, 6 Gray, 500; *Vaughan v. Hancock*, 3 C. B. 766; *Hardy v. Winter*, 38 Misso. 106; *Duke v. Harper*, 6 Yerg. 280. Contra, under the New York statute, *Young v. Dake*, 1 Selden, 463; under the Indiana statute, *Huffman v. Starks*, 31 Ind. 474; and under the New Jersey statute, *Birckhead v. Cummins*, 4 Vroom, 44.

⁶ *Inman v. Stamp*, 1 Stark. 12; Add. Con. 7th Eng. ed. 145.

⁷ *Wright v. Stavert*, 2 Ellis & E. 721. See *Wilson v. Martin*, 1 Denio, 602; *Spencer v. Halstead*, 1 Denio, 606.

agreement to share the profits and losses of a real-estate speculation contemplated by the parties.¹ And one verbally employed as an agent to sell land can recover for his services.² So a child's oral promise to his father, in consideration of lands conveyed to him by the latter, to release to his brothers and sisters all claim to the residue of the father's estate has been adjudged good.³ In like manner, a promise to attend a sale of lands and buy them need not be in writing. The principle finds illustration in multitudes of other cases not necessary to be here particularized.⁵

§ 1304. **Consideration.** — Within a principle explained in the last chapter,⁶ where a conveyance bargained for is actually made, any oral promise regarding the consideration — as, pay for the land — is good.⁷ But, even then, if the consideration itself is something concerning lands, within this Statute of Frauds, the promise to perform the thing must be in writing to be valid.⁸

§ 1305. **Part Performance.** — The principle on which a part performance of an oral contract takes the case out of the statute was stated in the last chapter.⁹ The illustrations of it are innumerable.

§ 1306. **Finally.** — It is believed that, since a full exposition of the details of the subject of this chapter is impossible, it is best to leave the reader here; the views already given serving to direct his further inquiries and, it is hoped,

¹ *Babcock v. Read*, 99 N. Y. 609; *McCarthy v. Pope*, 52 Cal. 561; *Benjamin v. Zell*, 4 Out. Pa. 33. But see *Parsons v. Phelan*, 134 Mass. 109.

² *Watson v. Brightwell*, 60 Ga. 212.

³ *Galbraith v. McLain*, 84 Ill. 379.

⁴ *Hale v. Stuart*, 76 Misso. 20.

⁵ *Gibbons v. Bell*, 45 Texas, 417; *Little v. McCarter*, 89 N. C. 233; *White v. Smith*, 51 Ala. 405; *Gafford v. Stearns*, 51 Ala. 434; *Estabrook v. Gebhart*, 32 Ohio State, 415; *Whitesell v. Heiney*, 58 Ind. 108; *McConnell v. Brayner*, 63 Misso. 461.

⁶ Ante, § 1235.

⁷ *Price v. Sturgis*, 44 Cal. 591; *Whitbeck v. Whitbeck*, 9 Cow. 266.

Nutting v. Dickinson, 8 Allen, 5; *Basford v. Pearson*, 9 Allen, 387; *May v. Mason*, 3 Bush, 35; *Mott v. Hurst*, 73; *Gillet v. Burr*, stated 1 R. 74; *Bradley v. Blodget*, Kirby, 22; *Nierson v. Saunders*, 36 Maine, 4; *Thayer v. Viles*, 23 Vt. 494; *Brack v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 549; *Smith v. Gould*, 6 Cush. 154; *Short v. Woodward*, Gray, 86; *Trowbridge v. Wetherbee*, Allen, 361. And see *Lower v. Wint*, 7 Cow. 263.

⁸ *Townsend v. Townsend*, 6 M. 319; *Patterson v. Cunningham*, 3 Fa. 506.

⁹ Ante, § 1237.

keep him from the mistakes which not unfrequently impede these investigations.

§ 1307. *The Doctrine of this Chapter restated.*

This fourth section of the Statute of Frauds, in the clause now under consideration, has no relation to the principle which requires conveyances of land to be by deed.¹ Nor does it apply to any contracts which are executed on both sides. Nor does it restrain the voluntary doing of anything orally promised. It deals simply with what is executory. Moreover, it leaves in full force the doctrine of estoppel, and permits its application to lands; so that, under this doctrine, lands may even be transferred without writing.² And it does not require writing for any contract which the law creates.³ The further details will best appear on a reperusal of the chapter.

¹ *Cherry v. Heming*, 4 Exch. 631.

² *Ante*, § 309.

³ *Ante*, § 193.

CHAPTER L.

BARGAININGS IN PERSONAL PROPERTY.

§ 1308. **By Simple Contract — (Seal — Writing).** — A seal is not required to a conveyance of personal property. Nor, except as to some particular things by reason of their special nature, is, at the common law, any writing.¹ And it is the same of other bargainings relating to personal property.² Thus, —

§ 1309. **Formalities at Common-law Sale of Goods.** — Aside from the Statute of Frauds, an executory contract for the purchase and sale of goods does not differ from any other; requiring only the mutual consent of the parties, expressed either orally or in writing, and a consideration. To complete the sale, so that the title will pass to the buyer, the goods must be separated from the bulk whereof they are a part, or in some other way be so distinguished or specified that they can be known; and the terms must be definitively agreed upon. But neither actual delivery nor payment is indispensable.³ The buyer may then take possession of them, “on payment or tender of the price, and not otherwise,” where nothing had

¹ 2 Bl. Com. 440-443.

² Ante, § 1231.

³ 2 Kent Com. 492; 1 Chit. Con. 11th Am. ed. 518-528; *De Foncleare v. Shottenkirk*, 3 Johns. 170; *Carter v. Jarvis*, 9 Johns. 143; *Gardiner v. Suydam*, 3 Selden, 357; *McClung v. Kelley*, 21 Iowa, 508; *Tome v. Dubois*, 6 Wal. 548; *Folsom v. Moore*, 19 Maine, 252; *Stone v. Peacock*, 35 Maine, 385; *McCoy v. Moss*, 5 Port. 88; *Cockrell v. Warner*, 14 Ark. 345; *Walden v. Mur-*

dock, 23 Cal. 540; *Wilson v. Stratton*, 47 Maine, 120; *Sweeney v. Owsley*, 14 B. Monr. 413; *Doremus v. Howard*, 3 Zab. 390; *Connor v. Williams*, 2 Rob. N. Y. 46; *Dunlap v. Berry*, 4 Scam. 327; *Wing v. Clark*, 24 Maine, 366; *Goodrum v. Smith*, 3 Humph. 542; *Broyles v. Lowrey*, 2 Sneed, Tenn. 22; *Hudson v. Weir*, 29 Ala. 294; *Riddle v. Varnum*, 20 Pick. 280; *McLaughlin v. Piatti*, 27 Cal. 451.

been arranged as to the time of payment or of delivery, or without payment if there had been an affirmative agreement for credit.¹ A third person, who has attached the goods as the seller's, or bought them of him, occupies a different position; and, as against him, to render the title of the first purchaser complete, they must have been paid for, or delivered, or both, or neither, according to the circumstances, and the varying adjudications of the different tribunals.² Now, —

§ 1310. **Statute of Frauds.** — Upon this condition of things came the Statute of Frauds, explained, as to its fourth section,³ in the last two chapters. A further provision of the same statute is, like that one, perhaps common law in our States; and, in a similar way, it has been in all re-enacted, substantially in the same terms, but with various minor differences.⁴ In the original statute of Charles II., it constitutes the —

§ 1311. **Seventeenth Section.** — Its words are: —

"No contract for the sale of any goods, wares, and merchandises, for the price of ⁵ ten pounds sterling or upwards, shall be allowed to be good; except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."⁶

¹ 2 Kent Com. 492; *Atwood v. Lucas*, 53 Maine, 508.

² *Costar v. Davies*, 8 Ark. 213; *Davis v. Ransom*, 4 Mich. 238; *Woodburn v. Cogdal*, 39 Misso. 222; *Samuels v. Gorham*, 5 Cal. 226; *Jorda v. Lewis*, 1 La. An. 59; *Vining v. Gilbreth*, 39 Maine, 496; *Barr v. Reitz*, 3 Smith, Pa. 256; *Pierce v. Chipman*, 8 Vt. 334, 337; *Foster v. Wallace*, 2 Misso. 231; *Ludwig v. Fuller*, 17 Maine, 162; *Kendall v. Hughes*, 7 B. Monr. 368; *Veazie v. Somerby*, 5 Allen, 280; *Lake v. Morris*, 30 Conn. 201; *Marshall v. Morehouse*, 14 La. An. 689; *Short v. Tinsley*, 1 Met. Ky. 397; *Howland v. Harris*, 4 Mason,

497; *Sawyer v. Nichols*, 40 Maine, 212; *Tanneret v. Edwards*, 18 La. An. 606; *Rockwood v. Collamer*, 14 Vt. 141; *Stephenson v. Clark*, 20 Vt. 624; *McKinley v. Ensell*, 2 Grat. 333; *Parsons v. Dickinson*, 11 Pick. 352.

³ Ante, § 1232.

⁴ Ante, § 1229, 1230.

⁵ One of the effects of the statute of 9 Geo. 4, c. 14, § 7, enacted in 1828, too late to be common law with us, was to change the words "for the price of" to "of the value of." *Harman v. Reeve*, 18 C. B. 587.

⁶ 29 Car. 2, c. 3, § 17.

§ 1312. **Executed.** — It is unquestioned doctrine that this seventeenth section, unlike the fourth,¹ extends to the executed contract; by reason of which no sale is valid except when its terms have been complied with.² On the other hand, —

§ 1313. **Executory.** — There were early rulings in England to the effect that this statute does not include executory contracts.³ To correct which the statute of 9 Geo. 4, c. 14, § 7, directed that it should be applied “notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.” But before this statute was passed the courts had corrected their early mistake, holding this seventeenth section applicable as well to executory as to executed contracts.⁴ And the latter is the doctrine of the American courts.⁵

§ 1314. **All Sales — (Auction).** — This statute governs all the forms of selling goods; as, at auction,⁶ and every manner of private sale. As to the sorts of things, —

§ 1315. **“Goods, Wares,” &c.** — Not all personal things which are the subjects of sale are within this statute; but its words are “goods, wares, and merchandises,” which, while they comprehend most personal property, do not all.⁷ They are interpreted liberally; even, in a part of our States, as

¹ Ante, § 1234.

² 2 Kent Com. 493; *Marsh v. Hyde*, 3 Gray, 331; *Buxton v. Bedall*, 3 East, 303; *Alexander v. Comber*, 1 H. Bl. 20. But see *Bucknam v. Nash*, 3 Fairf. 474.

³ For example, *Towers v. Osborne*, 1 Stra. 506; recitation in 9 Geo. 4, c. 14, § 7; *Clayton v. Andrews*, 4 Bur. 2101.

⁴ *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 T. R. 14, 16, 17; *Garbutt v. Watson*, 5 B. & Ald. 613.

⁵ *Bennett v. Hull*, 10 Johns. 364; *Crookshank v. Burrell*, 18 Johns. 58;

Cason v. Cheely, 6 Ga. 554; *Edwards v. Grand Trunk Railway*, 48 Maine, 379; *Waterman v. Meigs*, 4 Cush. 497; *Jackson v. Covert*, 5 Wend. 139.

⁶ *Davis v. Rowell*, 2 Pick. 64; *Davis v. Robertson*, 1 Mill, 71; *Kenworthy v. Schofield*, 2 B. & C. 945.

⁷ See, as to statutory terms of this sort in the criminal law, *Bishop Stat. Crimes*, § 209, 344, 345, 1090, 1092; *Bishop Dir. & F.* § 187, note; 2 *Bishop Crim. Law*, § 358, 479, 785; 2 *Bishop Crim. Proced.* § 699, 736.

including corporation stocks,¹ bank notes,² and promissory notes.³ The courts in other of our States⁴ and in England stop short of this; and, in the latter, they are held not to extend to stocks.⁵ In Georgia, "accounts," said Warner, C. J., "are made transferable;" whereupon they are adjudged to be "goods, wares, and merchandise" within this statute.⁶ In actual usage among the dealers in various sorts of personal property, it is believed that the instruments of trade and commerce, such as bank bills and promissory notes, and *quasi*-partnership interests in corporate enterprises, called stocks, are not often designated as "goods, wares, and merchandise;" though, like men's souls, they are not unfrequently in the market, and bought and sold. Again, —

§ 1316. **Labor and Materials** — are not within these statutory words. Therefore, plainly, an agreement with a mechanic to manufacture an article from the employer's materials need not be in writing.⁷ And even where the mechanic furnishes them, the doctrine appears to be reasonably well established, though not quite without dissent, that an oral bargaining for the making of the thing is good.⁸ But a contract for merchandise, as distinguished from this for the manufacture of the particular article, is within the statute, though it is to be

¹ *Tisdale v. Harris*, 20 Pick. 9; *North v. Forest*, 15 Conn. 400; *Southern Ins. &c. Co. v. Cole*, 4 Fla. 359; *Colvin v. Williams*, 3 Har. & J. 38; *Fine v. Hornsby*, 2 Misso. Ap. 61; *Boardman v. Cutter*, 128 Mass. 388.

² *Riggs v. Magruder*, 2 Cranch C. C. 143.

³ *Baldwin v. Williams*, 3 Met. 365; *Gooch v. Holmes*, 41 Maine, 523.

⁴ *Whittemore v. Gibbs*, 4 Fost. N. H. 484; *Beers v. Crowell*, Dudley, Ga. 28; *Hudson v. Weir*, 29 Ala. 294.

⁵ *Bowlby v. Bell*, 3 C. B. 284; *Humble v. Mitchell*, 11 A. & E. 205; *Watson v. Spratley*, 10 Exch. 222; *Tempest v. Kilner*, 3 C. B. 249; *Knight v. Barber*, 16 M. & W. 66; *Heseltine v. Siggers*, 1 Exch. 856.

⁶ *Walker v. Supple*, 54 Ga. 178, 179.

⁷ *Atkinson v. Bell*, 8 B. & C. 277, 283.

⁸ *Parsons v. Loucks*, 48 N. Y. 17; *Cummings v. Dennett*, 26 Maine, 397; *Finney v. Apgar*, 2 Vroom, 266; *Crookshank v. Burrell*, 18 Johns. 58; *Abbott v. Gilchrist*, 38 Maine, 260; *Allen v. Jarvis*, 20 Conn. 38; *Mixer v. Howarth*, 21 Pick. 205; *Spencer v. Cone*, 1 Met. 283; *Phipps v. McFarlane*, 3 Minn. 109; *Meincke v. Falk*, 55 Wis. 427. And, as relating to this principle, consult *Rentch v. Long*, 27 Md. 188; *Bird v. Muhlinbrink*, 1 Rich. 199; *Eichelberger v. McCauley*, 5 Har. & J. 213; *Gadsden v. Lance*, 1 McM. Eq. 87; *Woodford v. Patterson*, 32 Barb. 630; *Suber v. Pullin*, 1 S. C. 273; *Whitehead v. Root*, 2 Met. Ky. 584.

delivered in the future, and it does not affirmatively appear to be yet made, and it is not in fact.¹ Again,—

§ 1317. **Price — (Value).**—The contract is not within the statute, therefore is governed by the common-law rules, where the price is less than a sum which it specifies. We have seen, that, in England,² it is ten pounds; in Massachusetts,³ Indiana,⁴ and New York⁵ respectively, it is fifty dollars, which is probably not uncommon with us. In Maine⁶ and New Jersey⁷ it is thirty dollars. Where the statutory word is “value” instead of price,⁸ and the parties in their bargaining fix no price, the case is within or without the statute according as the jury find the value above or below the standard sum.⁹ In a sale of —

§ 1318. **More Articles than One,**—the rule for determining the price is to compare, not the separate price of each article,

¹ *Lamb v. Crafts*, 12 Met. 353, 356; *Edwards v. Grand Trunk Railway*, 54 Maine, 105; *Waterman v. Meigs*, 4 Cush. 497; *Jackson v. Covert*, 5 Wend. 139; *Sawyer v. Ware*, 36 Ala. 675; *Newman v. Morris*, 4 Har. & McH. 421; *Garbutt v. Watson*, 5 B. & Ald. 613. **In England.**—Possibly the statute of 9 Geo. 4, c. 14, § 7 (ante, § 1313), has influenced the English decisions since it went into effect in 1828. In *Leake Con. 259*, the doctrine is stated as follows: “A contract with a person to work up his own materials in making an article, and to deliver it, may be a contract for work and labor and the materials incident to the employment, or a contract for the sale of goods, according to the circumstances. *Lee v. Griffin*, 1 B. & S. 272. Thus, a contract with an attorney to prepare a deed (see per Erle, J. in *Grafton v. Armitage*, 2 C. B. 336, 339; per Blackburn, J. in *Lee v. Griffin*, supra, at p. 277), a contract for contriving a machine for a certain purpose (*Grafton v. Armitage*, supra), a contract with a printer to print a book (*Clay v. Yates*, 1 H. & N. 73), are contracts for work and labor and materials, and not for the sale of goods, and are not within the statute. On the other hand,

a contract for the manufacture and delivery of a machine (*Atkinson v. Bell*, 8 B. & C. 277; see *Grafton v. Armitage*, supra), a contract with a tailor or shoemaker for the making of articles of their trade (per Coltman, J. in *Grafton v. Armitage*, supra, at p. 341), a contract with a miller for the delivery of flour (*Garbutt v. Watson*, 5 B. & Ald. 613; and see *Rondeau v. Wyatt*, 2 H. Bl. 63, 67), or with any manufacturer for the delivery of the produce of his manufacture (*Wilks v. Atkinson*, 6 Taunt. 11 [contra, *Parsons v. Loucks*, 48 N. Y. 17]), a contract to make a set of artificial teeth to fit the mouth of a person (*Lee v. Griffin*, supra), a contract with an artist for a work of art (*Lee v. Griffin*, supra; but see *Pollock, C. B.* in *Clay v. Yates*, supra, at p. 78), are not contracts for work and labor, but for the sale of goods when completed.”

² Ante, § 1311.

³ Mass. Gen. Stats. c. 105, § 5.

⁴ *Smith v. Smith*, 8 Blackf. 208.

⁵ *Dykens v. Townsend*, 24 N. Y. 57.

⁶ *Bucknam v. Nash*, 3 Fairf. 474.

⁷ *Carman v. Smick*, 3 Green, N. J. 252.

⁸ Ante, § 1311, note.

⁹ *Harman v. Reeve*, 18 C. B. 587.

but the combined price of all the articles transferred in the one sale, with the sum set down in the statute.¹

§ 1319. "Accept" and "Receive." — By one of the alternatives of the statute,² it is sufficient that, added to what constitutes a sale at the common law,³ the "buyer," at whatever price, "shall accept part of the goods so sold, and actually receive the same," or the whole: the transaction is thereby made valid.⁴ Such transfer may take place as well on a day subsequent to the oral bargaining as simultaneously therewith.⁵ One may actually "receive" goods which he does not accept, or "accept" what he does not receive; and the statute requires both.⁶ Acceptance may be, not only by words,⁷ but by "such a dealing with the goods as amounts to a recognition of the contract."⁸ Less will not suffice;⁹ as, if one orders of a dealer lumber to be placed on the former's premises, and the latter puts it there, the ownership is not transferred without some act of acceptance.¹⁰ Nor is it necessarily an acceptance by a purchaser that the goods are pointed out to him, and he replies that he will send for them.¹¹ The needful receiving requires a change of possession, but not for any particular space of time.¹² And where the goods are of a sort to admit only of a constructive delivery, it will suffice.¹³ Still, in actual affairs, we have nice

¹ *Gilman v. Hill*, 36 N. H. 311; *Jenness v. Wendell*, 51 N. H. 63; *Baldehy v. Parker*, 2 B. & C. 37. And see *Bishop Stat. Crimes*, § 1017.

² Ante, § 1311.

³ Ante, § 1309.

⁴ *Outwater v. Dodge*, 7 Cow. 85; *Denny v. Williams*, 5 Allen, 1; *Outwater v. Dodge*, 6 Wend. 397; *Houghtaling v. Ball*, 19 Misso. 84; *Ross v. Welch*, 11 Gray, 235; *Vincent v. Germond*, 11 Johns. 283; *McTaggart v. Rose*, 14 Ind. 230; *Denmead v. Glass*, 30 Ga. 637; *Davis v. Eastman*, 1 Allen, 422; *Chamberlin v. Robertson*, 31 Iowa, 408; *Malone v. Plato*, 22 Cal. 103.

⁵ *Bush v. Holmes*, 53 Maine, 417; *McKnight v. Dunlop*, 1 Selden, 537; *Field v. Runk*, 2 Zab. 525; *Veazie v. Holmes*, 40 Maine, 69; *Marsh v. Hyde*, 3 Gray, 331.

⁶ *Page v. Morgan*, 15 Q. B. D. 228, 230.

⁷ *Marvin v. Wallis*, 6 Ellis & B. 726, 733, 734; s. o. nom. *Marvin v. Wallace*, 2 Jur. n. s. 689.

⁸ *Bowen, L. J. in Page v. Morgan*, supra, at p. 233; *Stone v. Browning*, 68 N. Y. 598.

⁹ *Brewster v. Taylor*, 63 N. Y. 587; *Cahen v. Platt*, 69 N. Y. 348.

¹⁰ *Cooke v. Millard*, 65 N. Y. 352. And see *McKinney v. Wilson*, 133 Mass. 131.

¹¹ *Knight v. Mann*, 120 Mass. 219.

¹² *Marvin v. Wallis*, supra; *Remick v. Sandford*, 120 Mass. 309; *Rodgers v. Jones*, 129 Mass. 420; *Gaudette v. Travis*, 11 Nev. 149.

¹³ *Elmore v. Stone*, 1 Taunt. 458; *King v. Jarman*, 35 Ark. 190; *Garfield*

questions as to whether or not there have been a receiving and acceptance.¹

§ 1320. "**Earnest.**" — The statute distinguishes between "earnest" and "part payment;" either of which, if given by the buyer, will "bind the bargain."² Still earnest is a particular sort of part payment, for it is to be counted in as so much paid.³ It signifies any money, or any valuable article however small its value, which the buyer passes to the seller by whom it is accepted in token of good faith.⁴ But it must be retained by the latter, or it is not "earnest."⁵ "It has fallen," says Kent, "into very general disuse in modern times, and seems rather to be suited to the manners of simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present day. It has been omitted in the New York Revised Statutes."⁶ Therefore, instead of earnest, where there is neither a writing nor a delivery of goods, the buyer commonly resorts to the other alternative; namely, —

§ 1321. "**Part Payment.**" — The bargain, in such a case, is good if the "buyer" shall "give something in . . . part of payment;"⁷ otherwise, it is not.⁸

§ 1322. "**Note or Memorandum.**" — What is said, in the chapter before the last, of the "Memorandum or Note" which will satisfy one of the alternatives of the statute, was intentionally made applicable as well to this seventeenth section as to the fourth.⁹ The leading rule is, that the memorandum must "contain all the essential terms of a sale."¹⁰

v. Paris, 96 U. S. 557; *Davis v. Jones*, 3 *Houst.* 68.

¹ And see 1 *Chit. Con.* 11th Am. ed. 554 et seq.

² *Ante*, § 1311.

³ *Pordage v. Cole*, 1 *Saund. Wms.* ed. 319*l*.

⁴ See and compare, in connection with the terms of the statute itself, the word "Earnest" in the law dictionaries; also 2 *Kent Com.* 495 and note; 2 *Bl. Com.* 447, 448; *Add. Con.* 7th Eng. ed. 449, 450; 1 *Chit. Con.* 11th Am. ed. 519, 520, 564, 565; *Blakey v. Dinsdale*,

Cowp. 661, 664; *Bach v. Owen*, 5 *T. R.* 409, 410; *Langfort v. Tiler*, 1 *Salk.* 113.

⁶ *Blenkinsop v. Clayton*, 1 *Moore*, 328, 7 *Taunt.* 597.

⁵ 2 *Kent Com.* 495, note.

⁷ *Ante*, § 1311; *Pierce v. Gibson*, 2 *Ind.* 408.

⁸ *Kirby v. Johnson*, 22 *Misso.* 354.

⁹ *Ante*, § 1242-1249. And see *Stone v. Browning*, 68 *N. Y.* 598; *Kriete v. Myer*, 61 *Md.* 558.

¹⁰ *May v. Ward*, 134 *Mass.* 127, 128, by C. Allen, J.

The reader will bear in mind that no writing is required where there has been a receiving and acceptance, or earnest, or part payment.

§ 1323. **Void or Voidable.** — There is abundant authority for saying, that a contract of sale in non-compliance with this section is not, as under the section explained in the last two chapters, voidable,¹ but it is void.² The difference appears in the statutory words themselves. Still, if we bear in mind that there are varying degrees of voidable, and every contract is of this sort which has any validity however slight,³ we shall be better satisfied with the later enunciations of the English and American tribunals; declaring it to be, both in principle and in the actual results of prior decisions, voidable, and not void.⁴ It has not the same effect as some other voidable contracts; for it does not transmit the title,⁵ while some others do.⁶ Nor is its precise effect well defined, yet it seems to have some; thus, —

§ 1324. **Illustrations — (Strangers — Creditors).** — As under the fourth section,⁷ so under this, “the defence of the statute is” said to be “a personal one, and can only be made by parties or privies;”⁸ so that a stranger to the bargaining can never object that it was not in writing.⁹ For example, after two persons have made an oral agreement of purchase and sale which, by this section, should be in writing, a third, who defrauds one of them by representing to another that the former will not perform, is liable for the tort precisely the same as though such agreement were duly written,¹⁰ — which, it is submitted, could not be if it were a mere nullity. And a creditor cannot question a sale of his debtor’s goods on the ground that, in violation of this section, it was oral.¹¹

¹ Ante, § 1238.

² *Alderton v. Buchoz*, 3 Mich. 322; *Daniel v. Frazer*, 40 Missis. 507; *Head v. Goodwin*, 37 Maine, 181.

³ Ante, § 617.

⁴ Lord Blackburn in *Maddison v. Alderson*, 8 Ap. Cas. 467, 488; *Townsend v. Hargraves*, 118 Mass. 325, 334; *Bird v. Munroe*, 66 Maine, 337, 343; *Herman v. Reeve*, 18 C. B. 587.

⁵ Ante, § 1312; *Alexander v. Comber*, 1 H. Bl. 20.

⁶ Ante, § 618, 672, 927, 928, 975, 976.

⁷ Ante, § 1239.

⁸ *Elliott, J.* in *Dixon v. Duke*, 85 Ind. 434, 439.

⁹ *Rickards v. Cunningham*, 10 Neb. 417.

¹⁰ *Benton v. Pratt*, 2 Wend. 385, 390; *Rice v. Manley*, 66 N. Y. 82.

¹¹ *Dixon v. Duke*, *supra*.

§ 1325. *The Doctrine of this Chapter restated.*

The section of the Statute of Frauds explained in this chapter, like that in the last two, renders no contract valid which was not so at the common law. Both sections add to the common-law requirements, neither abstracts anything therefrom. Whether the contract which omits the formalities pointed out in this section is, like one omitting those of the other, merely voidable, or is void, is a question on which opinions differ. While, under the other section, a writing is always necessary, under this it is but one among alternative methods by which the contract is made good. For any case to be within this section, the contract must be "for the sale of" "goods, wares, and merchandise," of a price or value in the statute specified.

CHAPTER LI.

OTHER CONTRACTS AS TO WRITING.

§ 1326. **Already** — we have seen that oral words are of the same effect in a contract as unsealed written ones; except in some special classes of cases, for each of which, by reason of something supposed to distinguish it from the mass, the law has provided a different rule.¹ A seal, attached to what without it would be a good simple contract in writing, imparts to it a certain superior quality already explained.² To continue now our illustrations of exceptions to the general rule, —

§ 1327. **Conveyances of Land.** — It has already incidentally appeared³ that a deed of real estate, conveying the freehold, must be in writing under seal, irrespective of the Statute of Frauds.⁴ And some deem this statute to have no relation to such deed.⁵ It is silent as to the seal; yet others interpret it to require, for so unquestionably does the law, from whatever source proceeding, every sort of conveyance of land (except leases for three years or less, reduced, in some of our States, to one year), as well as all contracts for any interest in land, to be in writing.⁶ The statute adds “signed;”⁷ yet we have probably no authority for saying, that the deed executed by sealing, without the signature,⁸ will not suffice as a conveyance. On the other hand, —

¹ Ante, § 151–160, 1231.

² Ante, § 119, 128–138, 274–279.

³ Ante, § 124, 151, 821, 853, 1151.

⁴ Crowell v. Maughs, 2 Gilman, 419; McCabe v. Hunter, 7 Misso. 355; Switzer v. Knapps, 10 Iowa, 72, Arms v. Burt, 1 Vt. 303.

⁵ Cherry v. Heming, 4 Exch. 631.

⁶ Ante, § 1289–1291; 4 Kent Com. 450 et seq.; Steel v. Payne, 42 Ga. 207; Crowell v. Maughs, supra; Whitney v. Swett, 2 Fost. N. H. 10; Veghte v. Raritan Water Power Co. 4 C. E. Green, 142; Sicard v. Davis, 6 Pet. 124, 135.

⁷ Ante, § 1232.

⁸ Ante, § 112.

§ 1328. **Receive Seisin.** — The authority to receive seisin may be orally conferred.¹ Again, —

§ 1329. **Trusts.** — By the parent Statute of Frauds, in sections distinct from those explained in the last three chapters,² express trusts in real estate can be created only by writing, but this does not extend to implied trusts.³ This provision has been generally adopted in our States.⁴

§ 1330. **Assignment.** — The contract termed an assignment,⁵ and the contract-interest thereby transferred, are distinct things; so that, though the latter was created by a writing, or even by an instrument under seal, the former may be oral.⁶ Even a judgment may be orally assigned.⁷ These propositions include another, namely, that a record or specialty may be assigned without seal.⁸ Yet an assignment, like any other contract, may, by a special provision of law, be required to be under seal. Thus, —

§ 1331. **Interest in Land.** — By the Statute of Frauds, as we have seen,⁹ there can be no unimpeachable conveyance even of an equitable interest in real estate except by writing. Whence it follows, that, if one has a bond for a deed, he cannot make a valid oral assignment of it, as between himself and his assignee; though, as the defence under the fourth section is personal only,¹⁰ the maker of the bond could not plead the statute in bar of a suit to compel its specific performance.¹¹

¹ *Pratt v. Putnam*, 13 Mass. 361; *Reed v. Marble*, 10 Paige, 409.

² 29 Car. 2, c. 3, § 7-9; *Throop v. Hatch*, 3 Abb. Pr. 23.

³ Ante, § 194. See further, as to the two kinds of trusts, ante, § 1215, 1216.

⁴ 4 Kent Com. 305; *Ready v. Kearsley*, 14 Mich. 215; *Kane v. Gott*, 24 Wend. 641; *Church v. Sterling*, 16 Conn. 388; *Moore v. Moore*, 38 N. H. 382; *Fleming v. Donahoe*, 5 Ohio, 255; *Fairchild v. Rasdall*, 9 Wis. 379.

⁵ Ante, § 1177-1199.

⁶ Ante, § 155; *Currier v. Howard*, 14 Gray, 511, 513; *Allen v. Pancoast*, Spencer, 68; *Mitchell v. Mitchell*, 1 Gill, 66; *Sexton v. Fleet*, 2 Hilton, 477; *Gal-*

way v. Fullerton, 2 C. E. Green, 389; *Vose v. Handy*, 2 Greenl. 322; *Littlefield v. Smith*, 17 Maine, 327.

⁷ *Ford v. Stuart*, 19 Johns. 342. And see *Brewer v. Franklin Mills*, 42 N. H. 292.

⁸ *Dawson v. Coles*, 16 Johns. 51; *Howell v. Bulkley*, 1 Nott. & McC. 249, 250; *Becton v. Ferguson*, 22 Ala. 599; *Cotten v. Williams*, 1 Fla. 37; *Morange v. Edwards*, 1 E. D. Smith, 414; *Moore v. Waddle*, 34 Cal. 145.

⁹ Ante, § 1286, 1290-1298, 1302, 1327.

¹⁰ Ante, § 1238, 1239.

¹¹ The authorities to this plain proposition are less distinct and direct than one might desire, but the reader may

§ 1332. **Notes and Bills.** — “By the custom of merchants, bills of exchange and promissory notes, and other similar negotiable instruments, must be reduced into writing, and signed by the parties thereto.”¹ But this results equally also from the necessity of the case. Words are air, and there could be no indorsement written on the back of oral words.² Yet we have seen³ that an oral acceptance of a bill is good, — a proposition which has been limited to cases where the drawee has funds of the drawer; so that, when he pays, he satisfies his own debt.⁴

§ 1333. **Statutory Liens,** — of which there are in our States many varieties, are in some cases available only when there is a written contract, and in some it must also be recorded.⁵

§ 1334. **Other Contracts.** — There are probably, in every one of our States, other contracts required to be in special forms. But they depend on statutes not uniform, or not widely operative throughout the country; so it is best that these illustrations here close.

§ 1335. *The Doctrine of this Chapter restated.*

The Statute of Frauds is the only one of constant use, prevailing in all our States, by which special forms have been added to those of the common law, for particular sorts of contract. Yet by the common law, in its later period, and irrespective of this statute, a seal is necessary to a conveyance of land, transferring the seisin. *Prima facie*, any contract by mere oral words is good. One who claims that a bargaining, other than a conveyance of land, or a bill or note, is not valid

consult the following: Bullion *v.* Campbell, 27 Texas, 653; Newnan *v.* Carroll, 3 Yerg. 18; Currier *v.* Howard, 14 Gray, 511; Robinson *v.* Williams, 3 Head, 540; Richards *v.* Richards, 9 Gray, 313; Finch *v.* Finch, 10 Ohio State, 501, 508, 509; Millard *v.* Hathaway, 27 Cal. 119; Love *v.* Cobb, 63 N. C. 324; Durst *v.* Swift, 11 Texas, 273; Chadsey *v.* Lewis, 1 Gilman, 153.

¹ 1 Chit. Con. 11th Am. ed. 91.

² Ante, § 152.

³ Ante, § 157.

⁴ Walton *v.* Mandeville, 56 Iowa, 597.

⁵ Bain *v.* Brooks, 46 Missis. 537; Shepherd *v.* Leeds, 12 La. An. 1; Ritter *v.* Stevenson, 7 Cal. 388; Hilliard *v.* Allen, 4 Cush. 532.

without writing, must show the statute. And there are instances, not mentioned in the preceding chapters, in which he can do so ; as, in some of our States, an insurance policy is by statute required to be in writing,¹ and perhaps even under seal.²

¹ Ante, § 154.

² *Lindauer v. Delaware Ins. Co.* 13 Ark. 461.

BOOK IV.

TIME AND PLACE.

CHAPTER LII.

TIME AS AN ELEMENT IN THE CONTRACT.

§ 1336. Introduction.

1337-1343. How compute.

1344-1348. Essence of Contract or not.

1349. Doctrine of Chapter restated.

§ 1336. **How Chapter divided.** — We shall consider, I. How Time in a Contract is computed ; II. Time as of the Essence of the Contract or not.

I. *How Time in a Contract is computed.*

§ 1337. **Elsewhere.** — In the author's "Written Laws," there is a chapter on the "Computation of Time in Statutes."¹ It was there explained that, with slight exceptions, the rules for statutes and contracts are the same.² Repetitions here of what is said there, are as much as possible avoided, but they cannot be absolutely ; so the reader will enlarge his views of the subject by consulting that chapter in connection with this.

§ 1338. **Year — Half — Quarter — 29th February.** — The English statute of 21 Hen. 3, entitled *De Anno et Die Bissextili*, is common law in our States.³ It provides that the 29th day of

¹ Bishop Written Laws, § 104 b-111.² *Ib.* § 104 b, 105, note.³ *Swift v. Tousey*, 5 Ind. 196 ; *Craft v. State Bank*, 7 Ind. 219 ; *Kohler v.*

February, in leap year, "and the day next going before, shall be accounted for one day."¹ Hence, among other consequences, if there could be any doubt under the prior law, a year in a contract, alike in leap year and in other years, is measured by the calendar and varies with it.² Still this word "year," like any other, may be modified in meaning by the connection in which it is used, and the subject.³ Coke tells us, that a half year consists of one hundred and eighty-two days, and a quarter year of ninety-one days; "for the odd hours, in legal computation, are rejected."⁴

§ 1339. **Month.**—As our law had a beginning before the present calendar, and then the word "month" meant a lunar one of twenty-eight days,⁵ neither in popular acceptance nor in legal interpretation was its meaning at once completely changed. Even to this day, by the English courts, "month" in a contract is held to be lunar, where there is neither a custom nor anything in its subject or other terms to indicate the contrary.⁶ Yet the intention of the parties is accepted as the test of the sort of month;⁷ and, in mercantile paper, under the custom of merchants, it is interpreted to be calendar.⁸ With us, in all sorts of contract, a calendar month is commonly understood to be meant, unless the contrary appears.⁹ As some months are by the calendar longer than

Montgomery, 17 Ind. 220; Kilty Rep. Stats. 208; Report of Judges, 3 Binn. 595, 600.

¹ *Rex v. Worminghall*, 6 M. & S. 350.

² And see Co. Lit. 135 a; 2 Inst. 320; *Engleman v. The State*, 2 Ind. 91; Anonymous, 1 Ld. Raym. 480.

³ Bishop Written Laws, § 106; *Thornton v. Boyd*, 25 Missis. 598; *Paris v. Hiram*, 12 Mass. 262.

⁴ Co. Lit. 135 b.

⁵ Bishop Written Laws, § 105; *Catesby's Case*, 6 Co. 61 b, 62 a; *Tullet v. Linfield*, 3 Bur. 1455.

⁶ *Simpson v. Margitson*, 11 Q. B. 23; *Turner v. Barlow*, 3 Fost. & F. 946. The former of these cases was before the enactment of 13 & 14 Vict. c. 21, § 4, A.D. 1850, which directed that the

word "month" should, in *statutes*, be interpreted as calendar, unless the contrary appeared. But I have seen nothing to indicate that it has had any effect on the construction of contracts.

⁷ *Lang v. Gale*, 1 M. & S. 111.

⁸ 2 Chit. Con. 11th Am. ed. 1064; *Leffingwell v. White*, 1 Johns. Cas. 99; *Thomas v. Shoemaker*, 6 Watts & S. 179; *Bank of Tennessee v. Officer*, 3 Baxter, 173.

⁹ *Sheets v. Selden*, 2 Wal. 177, 190; *Hardin v. Major*, 4 Bibb, 104; *Shapley v. Garey*, 6 S. & R. 539; *Satterwhite v. Burwell*, 6 Jones, N. C. 92; *Leffingwell v. White*, 1 Johns. Cas. 99; *Thomas v. Shoemaker*, 6 Watts & S. 179. As to what is half of a month, see *Grosvenor v. Magill*, 37 Ill. 239.

others, so they are in a contract, each particular month being measured by the part of the calendar in which it belongs.¹

§ 1340. **Day** — (**Fractions of**). — In general, a day in our law consists of twenty-four hours, beginning and ending at midnight.² But, in computing time, fractions of a day are, as a rule, disregarded;³ though they are taken into the account in exceptional instances, where justice requires.⁴ Commonly the fraction is counted as an entire day, yet it is sometimes altogether rejected,⁵ or one fraction is rejected and another is reckoned as a day. Thus, —

§ 1341. **Numbered Days**. — On a promise to do a thing in a specified number of days, the fraction of the day of the promise is rejected, and that of the day of performance is reckoned as a full day; for example, if one on Monday bargains to pay money in seven days, payment is due the next Monday.⁶ Or, if the undertaking were to pay money in seven days after notice, and notice was given on Monday, it would be due the next Monday.⁷ Still, —

§ 1342. **Subject** — **Words**. — The form of the expression, and even the subject, may, or not, in the particular instance, carry the performance a day backward or forward, — a question on which the books have various distinctions, with some differences of judicial opinion. Yet, looking more deeply, we discover that all the refinements are disregarded, and justly, when they would conduct to conclusions contrary to what the parties evidently meant.⁸ And the leading and only

¹ Bishop Written Laws, § 110 *a*; Toml. Law Dict. "Month;" Titus v. Preston, 1 Stra. 652; Watson v. Pears, 2 Camp. 294; Webb v. Fairmaner, 3 M. & W. 473; Lang v. Gale, 1 M. & S. 111.

² Ante, § 894; 2 Bl. Com. 141.

³ Anonymous, 1 Ld. Raym. 480; Bishop Written Laws, § 108; Jones v. Planters Bank, 5 Humph. 619; Portland Bank v. Maine Bank, 11 Mass. 204; In re Welman, 20 Vt. 653.

⁴ Bishop Written Laws, § 29, 108, 109; 2 Saund. 6th ed. by Wms. 148 *d*, note; Tufts v. Carradine, 3 La. An. 430; Gartside v. Silkstone, &c. Co. 21 Ch. D. 762; Louisville v. Portsmouth

Sav. Bank, 104 U. S. 469; Neale v. Utz, 75 Va. 480.

⁵ Bishop Written Laws, § 108.

⁶ Bigelow v. Willson, 1 Pick. 485, 496; Wiggin v. Peters, 1 Met. 127, 129; Homes v. Smith, 16 Maine, 181, 183; Henry v. Jones, 8 Mass. 453; Buttrick v. Holden, 8 Cush. 233; Farwell v. Rogers, 4 Cush. 460; Webb v. Fairmaner, 3 M. & W. 473, 477; Moorar v. Covington City Bank, 80 Ky. 305.

⁷ Protection Life Ins. Co. v. Palmer, 81 Ill. 88; Cann v. Warren, 1 Houst. 188; Hall v. Cassidy, 25 Missis. 48.

⁸ Ante, § 380.

helpful rule derivable from the authorities appears to be, to permit each particular word to be bent in its meaning by the combined whole ;¹ from which whole, rather than from isolated expressions, and from the matter of the contract, and the reason of the thing, the conclusion will be deduced.² Thus, —

§ 1343. *Illustrations.* — The word “until” is, in its strict sense, exclusive of the date to which it is attached, and it is so interpreted where there is nothing to indicate the contrary.³ But the connection may show it to be inclusive.⁴ Thereupon, taking into the account what was applicable to the particular case, an insurance policy for six months, “from the 14th day of February until the 14th day of August,” was adjudged to cover a loss on the latter day.⁵ And, still regarding the intent in the particular instance, an assignment of all rents “coming due to me until October 1” was construed as including those payable on the first day of October; while yet it was observed that “until,” like “from” and “between,” commonly “excludes the day to which it relates.”⁶ “From” was given its more common meaning as exclusive, in a lease for two years “from the first day of July,” making it commence on the second of July. And it was observed that, “where time is computed from an act done, the general rule is to include the day; where it is computed from the day of the act done, the day is excluded,”⁷ — a distinction for which there is a good deal of authority.⁸ But it is believed that not all courts will, and

¹ Ante, § 382, 383.

² *Wiggin v. Peters*, 1 Met. 127; *Lester v. Garland*, 15 Ves. 248; *Dakins v. Wagner*, 3 Dowl. P. C. 535; *Brown v. Johnson*, Car. & M. 440, *Pugh v. Leeds*, Cowp. 714; *Isaacs v. Royal Ins. Co.* Law Rep. 5 Ex. 296; *Commercial Steamship Co. v. Boulton*, Law Rep. 10 Q. B. 346; *Page v. Weymouth*, 47 Maine, 238; *The State v. Schnierle*, 5 Rich. 299.

³ *People v. Walker*, 17 N. Y. 502

⁴ *Rex v. Stevens*, 5 East, 244.

⁵ *Isaacs v. Royal Ins. Co.* Law Rep. 5 Ex. 296.

⁶ *Kendall v. Kingsley*, 120 Mass. 94, 95. And see *The State v. Schnierle*, 5 Rich. 299; *O'Connor v. Towns*, 1 Texas, 107.

⁷ *Atkins v. Sleeper*, 7 Allen, 487, 488, by Chapman, J.; *Perry v. Provident Life Ins. Co.* 99 Mass. 162.

⁸ *Bishop Written Laws*, § 31 a; *Hampton v. Erenzeller*, 2 Browne, Pa. 18; *Chiles v. Smith*, 13 B. Monr. 460; *White v. Crutcher*, 1 Bush, 472; *Wayne v. Duffy*, 1 Philad. 367.

none should, adhere to this or any other like technical distinction, in a case where, by disregarding it, they can better carry into effect what, all the considerations being taken into the account, it is reasonably plain the parties meant.¹

II. *Time as of the Essence of the Contract or not*

§ 1344. **In General.** — One's undertaking to do a thing on a particular day is broken if, when the day has passed, with no default in the other party, and no excuse appearing, it is not done.² And, in general, in a court of law, the time within which a contract is to be performed is as much the essence of it as any other part.³ But —

§ 1345. **Waiver.** — Time may be the subject of waiver, as already explained.⁴ Again, —

§ 1346. **Benefit Conferred.** — One may be entitled to recover, not universally, but under various exceptional circumstances not here to be particularized, for a benefit which, in the course of an ineffectual performance of his contract, he has conferred on the other party, who has accepted and retains it; the contract itself being by the former broken, whether in the particular of time or in any other.⁵ Now, —

§ 1347. **Equity** — regards time somewhat differently. Not exclusively,⁶ but oftenest, the question arises on a bill for the specific performance of a contract. Then, should the complainant have committed a lapse as to time, if time was not what is termed of the essence of the contract, if he acted in

¹ *Goode v. Webb*, 52 Ala. 452; *Wood v. Commonwealth*, 11 Bush, 220; *Bemis v. Leonard*, 118 Mass. 502; *Lester v. Garland*, 15 Ves. 248; *Lang v. Phillips*, 27 Ala. 311; *Cornell v. Moulton*, 3 Denio, 12; *Burr v. Lewis*, 6 Texas, 76; *Kimm v. Osgood*, 19 Misso. 60; *Weeks v. Hull*, 19 Conn. 376; *Gorham v. Wing*, 10 Mich. 486.

² *Hume v. Peploe*, 8 East, 168; *Poole v. Tumbidge*, 2 M. & W. 223; *Marshall v. Ferguson*, 23 Cal. 65; *Hansen v. Kirtley*, 11 Iowa, 565; *Weeks v. Little*, 89 N. Y. 566, 569.

³ *Warren v. Bean*, 6 Wis. 120, 124; *Barrett v. Hard*, 23 La. An. 712; *O'Donnell v. Leeman*, 43 Maine, 158; *Cromwell v. Wilkinson*, 18 Ind. 365; *Hill v. School District*, 17 Maine, 316; *Allen v. Cooper*, 22 Maine, 133.

⁴ *Ante*, § 795-798.

⁵ For something of the principle, see *ante*, § 217, 286, 301, 968-970, 1091-1110, 1219, 1221-1225; *Barnwell v. Kempton*, 22 Kan. 314.

⁶ *Whittington v. Roberts*, 4 T. B. Monr. 173; *Seton v. Slade*, 7 Ves. 265.

good faith, and if his cause is meritorious, he will have the relief prayed.¹ And such is the ordinary case.² But if the parties regard it of the essence, — as, if they have made it such by the form of their contracting,³ — or if the nature of the subject renders it such,⁴ or if the justice of the individual case requires, the court will treat it as of the essence, and hold the parties to the consequences.⁵

§ 1348. **At Law under Statutes.** — In England, the Judicature Act of 1873 directs the courts of law to follow the equity rules on this question.⁶ It is believed that such also is the effect of some of our American legislation.⁷

§ 1349. *The Doctrine of this Chapter restated.*

Time in a contract is, in most respects, computed by the judge in the same way as by any intelligent, non-professional person. But there are a few technical rules; such as, that a fraction of a day shall either be counted as a whole day or rejected altogether, except where some special reason demands the exact time. Prepositions, such as “to,” “from,” and the like, are to include or exclude the day to which they are attached, as the court deems that the one or the other will better carry out the intent of the parties. And two fractions, or one of them, or neither, will be rejected, those

¹ 1 Story Eq. § 776 et seq.; *Hearne v. Tenant*, 13 Ves. 287; *Hill v. Fisher*, 34 Maine, 143; *Paton v. Rogers*, 6 Madd. 256; *Jessop v. King*, 2 Ball & B. 81, 94; *Magoffin v. Holt*, 1 Duvall, 95; *Brashier v. Gratz*, 6 Wheat. 528; *Hall v. Delaplaine*, 5 Wis. 206; *Hild v. Linne*, 45 Texas, 476; *Langford v. Pitt*, 2 P. Wms. 629, 630.

² *Thurston v. Arnold*, 43 Iowa, 43; *Kercheval v. Swope*, 6 T. B. Monr. 362; *Brumfield v. Palmer*, 7 Blackf. 227; *Pedrick v. Post*, 85 Ind. 255.

³ *Hicks v. Aylsworth*, 13 R. I. 562; *Taylor v. Longworth*, 14 Pet. 172, 174. It has even been held that this may be shown by oral evidence. *Thurston v. Arnold*, 43 Iowa, 43.

⁴ *Jones v. United States*, 11 Ct. of Cl. 733; *Saltonstall v. Little*, 9 Norris, Pa. 422; *Griffin v. City Bank*, 58 Ga. 584.

⁵ *Shaw v. Turnpike*, 2 Pa. 454; *Usher v. Livermore*, 2 Iowa, 117; *Young v. Daniels*, 2 Iowa, 126; *Sneed v. Wiggins*, 3 Kelly, 94; *Liddell v. Sims*, 9 Sm. & M. 596; *Tyler v. McCardle*, 9 Sm. & M. 230; *Kemp v. Humphreys*, 13 Ill. 573; *Kirby v. Harrison*, 2 Ohio State, 326; *Potter v. Tuttle*, 22 Conn. 512; *Stow v. Russell*, 36 Ill. 18.

⁶ 36 & 37 Vict. c. 66, § 25 (7); *Patrick v. Milner*, 2 C. P. D. 342.

⁷ *Post*, § 1358.

retained being reckoned as full days, as the intent may be deemed to require. At law, one who does not perform his promise on the day is in default, and he cannot have redress for the default of the other party. But in equity a lapse as to time, if accidental or inevitable, and proceeding from no ill faith, will not bar the party's right; except where, by a stipulation in the contract, or from the nature of the case, or from some other like reason, time is of the essence of the contract. Yet never, even though time is not of the essence of the contract, will relief be given to one who unreasonably delays.¹

¹ Ditto *v.* Harding, 73 Ill. 117.

CHAPTER LIII.

THE STATUTE OF LIMITATIONS.

§ 1350. **Nature of Subject — (Here — Elsewhere).** — The Statute of Limitations is not quite uniform in our States, the interpretations of it are in a measure discordant, they are somewhat varying also at different periods, the cases upon it are numerous, and the subject has become vast. To unfold all its details here would be impossible. In “Statutory Crimes,”¹ the author explained its leading principles as to criminal causes, and incidentally in a degree as to civil. We shall in this chapter take of it such a condensed view as will enable the reader the better to comprehend the expositions in the other books; or, with simply the statutes and especially with the decisions also of his own State before him, to decide upon most of the questions under it which arise in practice.

§ 1351. **Delay — (Presumptive Payment — Ill Faith).** — Aside from the Statute of Limitations, and as the law stood before its enactment, lapse of time after a debt is contracted is always material, either alone or in connection with other facts, to the question whether or not it has been paid. And, under the unwritten law, the doctrine appears to have become established after some fluctuations, that payment of any debt, even of a specialty or a judgment, will, in a case where there is no recognition of it by the debtor, be presumed after a delay of twenty years unexplained; and a jury may infer it after a less period, varying with the circumstances.² More-

¹ Bishop Stat. Crimes, § 257-267.

² Bailey v. Jackson, 16 Johns. 210, 214; Clark v. Hopkins, 7 Johns. 556; Anonymous, 6 Mod. 22; Colsell v.

Budd, 1 Camp. 27; Oswald v. Legh, 1 T. R. 270; Rex v. Stephens, 1 Bur. 433, 434; Duffield v. Creed, 5 Esp. 52; Kingsland v. Roberts, 2 Paige, 193; Newman

over, a court of equity, or of admiralty, or a divorce court will refuse to enforce claims which, from lapse of time, it deems stale, or prosecuted from ill faith, or from some other than the apparent cause.¹ Such is now the law as to whatever is not within the —

§ 1352. **Statute of Limitations — (Old English).** — Probably the earliest English statute on this subject was that of 32 Hen. 8, c. 2, relating to real estate. It has had little or no effect in this country,² and we need not consider it further. The enactment important with us is 21 James 1, c. 16, limiting both real and personal actions. It constitutes the foundation of subsequent legislation, and to the present day is only in part repealed in England. It is common law in some of our States, possibly not in all.³ But practically, in most and perhaps in all of them, statutes of the State have taken its place.

§ 1353. **Course of Discussion.** — We shall now, assuming that the reader has before him the limitations statute of his own State, direct his attention to such adjudged doctrine as will assist him in its interpretation. Thus, —

§ 1354. **Beginning to Run.** — Assuming the statute to provide that all actions of a sort named shall be commenced within a number of years which it specifies after the cause of action has accrued, for the provision in most of the somewhat varying statutes is in substance so, the period of limitations takes its initial date — or, as commonly expressed, the statute

v. Newman, 1 Stark. 101; *Morrow v. Robinson*, 4 Del. Ch. 521; *Brubaker v. Taylor*, 26 Smith, Pa. 83; *Van Loon v. Smith*, 7 Out. Pa. 238; *Murphy v. Philadelphia Trust Co.* 7 Out. Pa. 379; *Shubrick v. Adams*, 20 S. C. 49; *Houck v. Houck*, 3 Out. Pa. 552; *Gaines v. Miller*, 111 U. S. 395; *Briggs's Appeal*, 12 Norris, Pa. 485; *Hillary v. Waller*, 12 Ves. 239; *Rowland v. Windley*, 86 N. C. 36.

¹ 2 Bishop Mar. & Div. § 103-112, 342, 582, 583, 621; *Daggers v. Van Dyck*, 10 Stew. Ch. 130; *Hall v. Denckla*, 28 Ark. 506; *In re Neilley*,

95 N. Y. 382; *The Harriet Ann*, 6 Bis. 13; *Hatcher v. Hall*, 77 Va. 573; *Hill v. Umberger*, 77 Va. 653; *Trader v. Jarvis*, 23 W. Va. 100; *Three Towns Banking Co. v. Maddever*, 27 Ch. D. 523.

² *Pancoast v. Addison*, Kilty Rep. Stats. 74; not reported as of force in Pennsylvania, Report of Judges, 3 Binn. 599, 619. But see *Boehm v. Engle*, 1 Dall. 15; *Morris v. Vanderen*, 1 Dall. 64; *Biddle v. Shippen*, 1 Dall. 19.

³ Cases cited from 1 Dall. *supra*; Kilty Rep. Stats. 237. For some reason it does not appear in Report of Judges, 3 Binn. 599, 623.

begins to run — from the time when the complaining party is first entitled to bring his suit for the particular claim.¹ For example, since, on a promissory note or other promise to pay a sum on demand, an action may be brought immediately without first making a demand in fact,² the Statute of Limitations begins to run from the date of such promise.³ And, on a promise to pay for a thing by bequest, it begins to run from the death of the person promising.⁴ On a deposit of money to be kept until demanded, no action accrues until a demand is made in fact; therefore, on such a deposit, the statute begins to run only upon such demand, not upon the deposit itself.⁵ The books contain hundreds, perhaps thousands, of illustrations of this principle; but nothing further from them seems necessary to its due comprehension.⁶ As to the —

§ 1355. **Particular Claim.** — On a suit for a particular claim, the Statute of Limitations will not be deemed to have begun to run against it until the right to sue therefor accrued; though the plaintiff might have earlier maintained an action on a different claim, operating to bar in part or in full the

¹ *Jones v. Jones*, 91 Ind. 378; *McMichael v. Carlyle*, 53 Wis. 504; *Pridgeon v. Greathouse*, 1 Idaho, n. s. 359.

² Post, § 1437.

³ *Andress's Appeal*, 3 Out. Pa. 421; *Milne's Appeal*, 3 Out. Pa. 483, 490.

⁴ *Eagan v. Kergill*, 1 Dem. 464.

⁵ *Zuck v. Culp*, 59 Cal. 142. And see *Robertson v. Dunn*, 87 N. C. 191; *Moore v. Greene Commissioners*, 87 N. C. 209; *Emerick v. Chesrown*, 90 Ind. 47.

⁶ The reader will readily find any desired number of illustrative cases in the digests. The following are among them: *Moore Commissioners v. MacRae*, 89 N. C. 95; *Cooper v. Cooper*, 61 Missis. 676; *McMullen v. Rafferty*, 89 N. Y. 456; *British North Amer. Bank v. Merchants Bank*, 91 N. Y. 106; *Frank v. Lanier*, 91 N. Y. 112; *Harrington v. Keteltas*, 92 N. Y. 40; *Kent Railroad v. Wilson*, 5 Houst. 49; *Bickle v. Chrisman*, 76 Va. 678; *Bacon v. Rives*, 106 U. S.

99; *Sullivan v. Davis*, 29 Kan. 28; *Carpenter v. Union*, 58 Iowa, 335; *Amy v. Dubuque*, 98 U. S. 470; *Beck v. Tarrant*, 61 Texas, 402; *Farnham v. Thomas*, 56 Vt. 33; *Goodnow v. Stryker*, 62 Iowa, 221; *Brush v. Barrett*, 82 N. Y. 400; *Vaughan v. Hines*, 87 N. C. 445; *National Bank v. Trimble*, 40 Ohio State, 629; *Kramer v. Carter*, 136 Mass. 504; *Rous v. Walden*, 82 Ind. 238; *Torian v. McClure*, 83 Ind. 310; *Holloway v. Turner*, 61 Md. 217; *Glenn v. Williams*, 60 Md. 93; *Harmon v. Page*, 62 Cal. 448; *Webb v. Smith*, 40 Ark. 17; *Little Rock, &c. Railway v. Chapman*, 39 Ark. 463; *Bonner v. Young*, 68 Ala. 35; *Adams v. Jones*, 68 Ala. 117; *Long v. Yanceyville Bank*, 90 N. C. 405; *Suber v. Chandler*, 18 S. C. 526; *Lane v. Farmer*, 11 Lea, 568; *Sturgis v. Preston*, 134 Mass. 372; *Tilston v. Brookline*, 134 Mass. 438; *School District v. School District*, 105 Ill. 653; *Newton v. Hammond*, 38 Ohio State, 430.

present one. For example, if, after a trespass, rendering the wrong-doer liable to a suit for damages, he promises to pay them, the statute does not run against this promise until it is made, though it does run against the original trespass.¹ In like manner, though the attorney in a cause has the right to withdraw and collect from his client compensation for services rendered, still, if he does not, the Statute of Limitations does not commence its effect upon his bill until his services are ended by the rendition of final judgment.² And other cases of continuous employment, within this principle, are therefore also within this rule.³

§ 1356. **Continuing to Run.** — After the statute has begun to run, it in most circumstances so continues, notwithstanding a subsequent obstacle to the suit, unless an express exception in the statute otherwise provides.⁴ Especially, —

§ 1357. **Not Knowing.** — One's ignorance of the facts giving him a cause of action against another — as, for the latter's undisclosed neglect⁵ or breach of trust,⁶ or having become able to pay what he had promised when he should be so,⁷ or for an unknown defect in a title which he had warranted,⁸ or the like — will not, in a court of law, prevent or intercept the running of a limitations statute which has no clause excepting this sort of case.⁹ But —

¹ *Farnham v. Thomas*, 56 Vt. 33. And see *McCombs v. Guild*, 9 Lea, 81.

² *Eliot v. Lawton*, 7 Allen, 274; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Fenno v. English*, 22 Ark. 170; *Walker v. Goodrich*, 16 Ill. 341; *Lichty v. Hugus*, 5 Smith, Pa. 434; *Martindale v. Falkner*, 2 C. B. 706; *Whitehead v. Lord*, 7 Exch. 691; *Davis v. Smith*, 48 Vt. 52; *Noble v. Bellows*, 53 Vt. 527.

³ *Sullivan v. Davis*, 29 Kan. 28; *Jones v. Grand Trunk Railway*, 74 Maine, 356; *Smith v. Velie*, 60 N. Y. 106; *Hastie v. Aiken*, 67 Ala. 313.

⁴ *Bishop Stat. Crimes*, § 261 a; *Peoria v. Gordon*, 82 Ill. 435; *Underhill v. Mobile Fire Dept. Ins. Co.* 67 Ala. 45; *Milne's Appeal*, 3 Out. Pa. 483; *Hun-*

ton v. Nichols, 55 Texas, 217; *Kistler v. Hereth*, 75 Ind. 177.

⁵ *Short v. McCarthy*, 3 B. & Ald. 626; *Howell v. Young*, 5 B. & C. 259; *Brown v. Howard*, 2 Brod. & B. 73; *Crawford v. Gaulden*, 33 Ga. 173; *Sinclair v. South Carolina Bank*, 2 Strob. 344.

⁶ *Cole v. McGlathry*, 9 Greenl. 131.

⁷ *Waters v. Thanet*, 2 Q. B. 757.

⁸ *Leonard v. Pitney*, 5 Wend. 30.

⁹ *Foster v. Rison*, 17 Grat. 321; *Campbell v. Long*, 20 Iowa, 382; *Martin v. Decatur Bank*, 31 Ala. 115; *Hartford Bank v. Waterman*, 26 Conn. 324; *Bossard v. White*, 9 Rich. Eq. 483; *Davis v. Cotten*, 2 Jones Eq. 430; *Reading v. Reading*, 1 Halst. 186; *Williams v. Pomeroy Coal Co.* 37 Ohio State, 583, 589; *Peak v. Buck*, 3 Baxter, 71.

§ 1358. **Fraudulent Concealment.** — Equity, under its jurisdiction to suppress frauds,¹ will in proper circumstances restrain the party from setting up the statute, or will hold its running to commence only after knowledge, or will postpone its operation, or otherwise deal with it, in such manner and to such extent as equitable principles require, so that the other party shall not be defrauded; and some of the statutes in terms run only from the time when a fraudulently concealed right becomes known to the person suing.² This equitable rule is now, in England, applied likewise by command of a statute in the courts of law,³ and it is believed to be so also in some of our States.⁴

§ 1359. **Renewed Promise.** — When, either in fact or by operation of law,⁵ the promise in a contract has been by the party renewed, the statute begins to run against this new promise only from the time when an action upon it can be maintained. This doctrine is of wide effect; and, as it stands in these general terms, is unquestioned. Yet the decisions upon some of its applications are quite discordant. To follow, at least, the better opinion, —

§ 1360. **Promise after Statutory Bar — Before — (Nature of Bar).** — In another connection⁶ we saw that, when the bar has become complete by a full lapse of the statutory time, it operates differently from the party's release, where a renewal of the promise does not revive the obligation unless a fresh consideration is added thereto.⁷ The statutory bar is the law's tender to the defendant of a benefit, which he may ac-

¹ Compare with ante, § 1237.

² *Gibbs v. Guild*, 8 Q. B. D. 296; *Haymore v. Yaddin Commissioners*, 85 N. C. 268; *Biggs v. Lexington, &c. Railroad*, 79 Ky. 470; *Duffitt v. Tuhan*, 28 Kan. 292; *Ossipee v. Grant*, 59 N. H. 70; *Somerset Freeholders v. Veghte*, 15 Vroom, 509; *Clews v. Traer*, 57 Iowa, 459; *Reed v. Minell*, 30 Ala. 61; *Pendergrast v. Foley*, 8 Ga. 1; *Walker v. Walker*, 25 Ga. 76; *Frankfort Bank v. Markley*, 1 Dana, 373; *Underhill v. Mobile Fire Dept. Ins. Co.* 67 Ala. 45; *Conolly v. Hammond*, 58 Texas, 11; *Frey*

v. Aultman, 30 Kan. 181; *Torrence v. Alexander*, 85 N. C. 143; *Conner v. Goodman*, 104 Ill. 365; *Harman v. Looker*, 73 Misso. 622; *Yniestra v. Tarleton*, 67 Ala. 126; *Harrell v. Kelly*, 2 McCord, 426; *Wilcox v. Jackson*, 57 Iowa, 278.

³ *Gibbs v. Guild*, supra.

⁴ Ante, § 732, 1348.

⁵ *Moore v. Bank of Columbia*, 6 Pet. 86; *Bell v. Morrison*, 1 Pet. 351.

⁶ Ante, § 95.

⁷ Ante, § 99.

cept or reject as he chooses ;¹ and, if he makes a new promise, he thereby waives this benefit,² and he is holden by virtue of the old consideration.³ *A fortiori*, the same consequence follows a renewal of the promise during the running of the statute.⁴ It must be to the party himself or his agent, or to one who is to communicate it to him ;⁵ or probably, within a doctrine heretofore explained,⁶ it will suffice if made to any person with the intent that the other shall act thereon.⁷ Moreover, —

§ 1361. **Promise created by Law.** — For this purpose, a new promise created by the law is equally effectual with an express one.⁸ As to which, the only doubt is, under what circumstances the law will create a new promise. But it is abundantly settled in authority, and is equally plain in reason, that it will whenever there is a —

§ 1362. **Fresh Acknowledgment.** — Under the rule that the law creates a promise from one to pay to another whatever it deems to be owing,⁹ if, at any time, a debtor makes to his creditor a fresh acknowledgment of the debt, the law adds thereto his promise to pay it ; and the statute commences a fresh running from the time when an action is maintainable on this new promise.¹⁰ But, contrary to various old cases which

¹ *Borders v. Murphy*, 78 Ill. 81.

² *Ante*, § 791, 803, 806.

³ *Ante*, § 94–100; *Norton v. Shepard*, 48 Conn. 141; *McClintic v. Layman*, 12 Bradw. 356; *Abrahams v. Swann*, 18 W. Va. 274; *Trumball v. Tilton*, 1 Fost. N. H. 128; *Bush v. Barnard*, 8 Johns. 407; *Dean v. Hewit*, 5 Wend. 257.

⁴ *Malone v. Searight*, 8 Lea, 91; *Hammond v. Smith*, 33 Beav. 452, 10 Jur. n. s. 117; *Steel v. Steel*, 2 Jones, Pa. 64; *Carlton v. Ludlow Woollen Mill*, 27 Vt. 496; *Noyes v. Hall*, 28 Vt. 645.

⁵ *Kirby v. Mills*, 78 N. C. 124; *Parker v. Shuford*, 76 N. C. 219; *Teessen v. Camblin*, 1 Bradw. 424; *Bachman v. Roller*, 9 Baxter, 409; *Fuqua v. Dinwiddie*, 6 Lea, 645.

⁶ *Ante*, § 1219–1221, 1227.

⁷ For cases more or less pertinent see *Utz v. Utz*, 34 La. An. 752; *Smith v. Campbell*, 5 Harring. Del. 380; *Whitney v. Bigelow*, 4 Pick. 110; *St. John v. Garrow*, 4 Port. 223; *Fort Scott v. Hickman*, 112 U. S. 150; *Maxwell v. Reilly*, 11 Lea, 307; *Nashville v. Toney*, 10 Lea, 643.

⁸ *Ante*, § 1359; *Norton v. Shepard*, 48 Conn. 141, 142.

⁹ *Ante*, § 204.

¹⁰ *Walsh v. Mayer*, 111 U. S. 31; *Bateman v. Pinder*, 3 Q. B. 574; *Philips v. Philips*, 3 Hare, 281, 299; *Yea v. Fouraker*, 2 Bur. 1099; *Bucket v. Church*, 9 Car. & P. 209; *Lloyd v. Maund*, 2 T. R. 760, 762; *Black v. Reybold*, 3 Harring. Del. 528; *Porter v. Hill*, 4 Greenl. 41; *Ross v. Ross*, 20 Ala. 105; *Murray v. Coster*, 20 Johns. 576, 586; *Elder v. Dyer*, 26 Kan. 604; *Palmer v. Gillespie*,

have been overruled, the acknowledgment must be of a sort on which the law can raise the new promise;¹ as, for example, that the debt remains due.² The later English and some of the American statutes, moreover, reject the acknowledgment or fresh promise unless it is in writing, but they do not otherwise modify the law of the subject.³ A particular form of acknowledgment is —

§ 1363. **Part Payment.** — If a debtor pays interest, or pays a part of the debt under circumstances involving an admission of the whole, he thereby makes the acknowledgment which takes the remainder out of the previously-running statute.⁴ But a simple payment of a given sum is no acknowledgment that more is due.⁵ Nor is a payment sufficient though accompanied by a recognition, from one not authorized thus to bind the party.⁶ Nor, where a Sunday contract would be invalid, will a payment implying a promise made on that day suffice;⁷ for, in such a case, the law will not impose on one an undertaking which it forbids him to assume in fact.

§ 1364. **Conditional.** — A conditional promise is as good for

14 Norris, Pa. 340; *Hannah v. Hawkins*, 5 Lea, 240; *Pope v. Andrews*, 90 N. C. 401.

¹ *Purdy v. Austin*, 3 Wend. 187, 190; *Riggs v. Roberts*, 85 N. C. 151; *Clementson v. Williams*, 8 Cranch, 72; *Wetzell v. Bussard*, 11 Wheat. 309; *Buckmaster v. Russell*, 10 C. B. N. S. 745, 8 Jur. N. S. 155; *Fuqua v. Dinwiddie*, 6 Lea, 645, 648; *Green v. Humphreys*, 26 Ch. D. 474. The language of some of the cases seems to imply that the acknowledgment must be of a sort indicating the defendant's *actual* intention, or *promise in fact*, to pay. But an examination of our chapter on created contracts, ante, § 181 et seq., will satisfy any careful reader that such cannot be the rule.

² *Bangs v. Hall*, 2 Pick. 368; *Perley v. Little*, 3 Greenl. 97; *Deshon v. Eaton*, 4 Greenl. 413; *Weston v. Hodgkins*, 136 Mass. 326, 327.

³ *Haydon v. Williams*, 4 Moore & P.

811, 7 Bing. 163; *Dickenson v. Hatfield*, 5 Car. & P. 46.

⁴ *Walker v. Wait*, 50 Vt. 668; *Cucullu v. Hernandez*, 103 U. S. 105; *United States v. Wilder*, 13 Wal. 254; *Engmann v. Immel*, 59 Wis. 249; *Glick v. Crist*, 37 Ohio State, 388; *Kaufman v. Broughton*, 31 Ohio State, 424; *Buxton v. Edwards*, 134 Mass. 567; *McGehee v. Greer*, 7 Port. 537; *Egery v. Decrew*, 53 Maine, 392; *Barron v. Kennedy*, 17 Cal. 574; *Sanford v. Hayes*, 19 Conn. 591; *Whipple v. Stevens*, 2 Fost. N. H. 219; *Davis v. Coleman*, 7 Ire. 424; *Ilisley v. Jewett*, 2 Met. 168; *Cocker v. Cocker*, 2 Misso. Ap. 451; *Hale v. Morse*, 49 Conn. 481.

⁵ *Lock v. Wilson*, 9 Heisk. 784, 10 Heisk. 441; *Harris v. Howard*, 56 Vt. 695.

⁶ *Lewis v. Ford*, 67 Ala. 143; *Butler v. Price*, 110 Mass. 97; *Littlefield v. Littlefield*, 91 N. Y. 203.

⁷ *Clapp v. Hale*, 112 Mass. 368; *Whitcher v. McConnell*, 59 N. H. 470.

the purpose under contemplation as any other ; but the party, to recover on it, must prove the fulfilment of the condition.¹

§ 1365. **Against whom.** — Statutes of limitation do not run against a State or the United States, unless by express words, which they do not ordinarily contain.² But it is believed that municipal corporations are not within the reason of this rule, so they cannot avail themselves of it, though the decisions to this proposition are not quite unanimous.³

§ 1366. **In Conclusion.** — Something further on this subject will appear in the next chapter.⁴ The foregoing expositions relate chiefly to those principles of the common law which the courts have woven into the interpretations of the statutes. Minuter details are omitted. It would not be within the plan of this work to expound the various exceptional clauses, or enter otherwise into discussions of fluctuating terms.

§ 1367. *The Doctrine of this Chapter restated.*

Natural justice dictates that differences and claims between parties shall not be forever open to litigation. And the unwritten law has so pronounced, but not by rules sufficiently exact for all practical purposes. Thereupon statutes have stepped in, and spoken with a voice more distinct. The interpretations of these statutes are a woof of the common law, driven by the judicial hand through the warp of the written provisions. So it is with all statutory interpretation. In the present instance, the courts have wavered a good deal in the particulars ; and much discord has appeared in the weaving of a fabric which, even now, is neither quite uniform nor free from minor defects.

¹ *Tanner v. Smart*, 6 B. & C. 603 ; *Stowell v. Fowler*, 59 N. H. 585 ; *Meyerhoff v. Froehlich*, 4 C. P. D. 63.

² *Bishop Stat. Crimes*, § 103, 142, note ; *Swann v. Lindsey*, 70 Ala. 507, 519 ; *United States v. Spiel*, 3 McCrary, 107 ; *United States v. Southern Colo.*

Coal, &c. Co. 18 Fed. Rep. 273, 5 McCrary, 563.

³ *Bishop Stat. Crimes*, § 103 *a* ; *Gaines v. Hot Spring*, 39 Ark. 262 ; *Coleman v. Thurmond*, 56 Texas, 514 ; *Forsyth v. Wheeling*, 19 W. Va. 318 ; *Oxford v. Columbia*, 38 Ohio State, 87.

⁴ *Post*, § 1409-1411.

CHAPTER LIV.

THE CONTRACT AS AFFECTED BY THE CONFLICTING LAWS
OF DIFFERENT JURISDICTIONS.

§ 1368. Introduction.

1369-1371. In General.

1372-1389. Inception of Contract.

1390-1398. Interpretation and Effect.

1399-1402. Discharge.

1403-1411. Procedure for Enforcement.

1412. Doctrine of Chapter restated.

§ 1368. **How Chapter divided.** — We shall consider, I. The Doctrine in General; II. The Inception of the Contract; III. The Interpretation and Effect of the Contract; IV. Its Discharge; V. The Procedure for its Enforcement.

I. *The Doctrine in General.*

§ 1369. **Nature of Topic.** — This chapter pertains to what, in legal language, is commonly termed the conflict of laws, or private international law. The entire subject is of wide extent, and within it are many disputed, perhaps difficult, questions. But of the part which concerns contracts, the leading rules are simple, and they may be shortly stated. Some of their secondary applications are not so plain, but our contracted space will not permit us to trace them far in this chapter.

§ 1370. **International Law — Comity.** — Among the necessities of our being is the law of nations, regulating the intercourse of the various sovereigns, sovereignties, and their subjects with one another. It constitutes a part of the

unwritten law of every people, and even the domestic statutes are interpreted as limited and controlled thereby.¹ One of the doctrines of this law is ordinarily termed the comity of nations, an expression objected to by some as not quite accurate, yet by others fully approved;² the meaning whereof is, that the tribunals of every nation will, of "comity," where no domestic considerations forbid, give effect to the rights which litigants have acquired under the laws of other nations.³ Whence the following —

§ 1371. **Resulting Doctrines — (Lex Loci — Lex Fori).** — A court, called upon to enforce a contract made in another State or country, tests its validity by the foreign law except where domestic policy forbids.⁴ Not that in any proper sense the foreign law controls the tribunal; but, being duly proved,⁵ it is, by that portion of its own law which is termed international, made domestic for the purpose.⁶ The discharge of a contract, if by the party, depends on the law of the place where given; if, by the act of the law, there must also be a jurisdiction over the question, and this is commonly, but not always exclusively, in the place where the contract was made or to be performed.⁷ But the procedure to enforce a right — in other words, the remedy — is no part of the right itself; without wrong to litigants, it may be varied from time to time even after the cause of action has arisen;⁸ for which reason, and because a court cannot substitute a foreign practice for its own, it, with whatever else depends on it, takes the same forms as though the cause were domestic.⁹ Where

¹ 1 Bishop Crim. Law, § 14, 124; Bishop Written Laws, § 141; Austria v. Day, 2 Gif. 628, 7 Jur. n. s. 483, affirmed 3 De G. F. & J. 217, 7 Jur. n. s. 639.

² Story Conf. Laws, § 28-38.

³ 1 Bishop Mar. & Div. § 361, 362; 2 Ib. § 163 a, note, 176; Diamond Match Co. v. Powers, 51 Mich. 145; Lewis v. Woodfolk, 2 Baxter, 25; Donovan v. Pitcher, 53 Ala. 411; Stevens v. Brown, 20 W. Va. 450; Zipcey v. Thompson, 1 Gray, 243, 245.

⁴ Evans v. Anderson, 78 Ill. 558;

Collins Iron Co. v. Burkam, 10 Mich. 283; Evans v. Kittrell, 33 Ala. 449; Bank of Augusta v. Earle, 13 Pet. 519.

⁵ Crawford v. Witten, Lofft, 154; Male v. Roberts, 3 Esp. 163.

⁶ 1 Bishop Mar. & Div. § 367; Caldwell v. Vanvlissengen, 9 Hare, 415, 425, 16 Jur. 115.

⁷ Post, § 1399-1402.

⁸ Bishop Written Laws, § 175, 176.

⁹ Ex parte Melbourn, Law Rep. 6 Ch. Ap. 64, 69; Trimby v. Vignier, 1 Bing. N. C. 151, 158; Whittemore v. Adams, 2 Cow. 626; Burchard v. Dun-

a contract is made in one country to be performed in another, the rule of following the intent of the parties¹ commonly requires it to be interpreted after the law of the latter.² These propositions are subject to exceptions and explanations which, together with minuter statements of the doctrine itself, will now be given.

II. *The Inception of the Contract.*

§ 1372. **Common Rule.** — The rule on this subject is commonly stated to be, that a contract valid where made is valid everywhere, and one invalid where made is everywhere invalid.³ But these propositions should be separately examined; thus, —

§ 1373. *Valid where made* : —

Valid everywhere. — Subject to exceptions derivable from the reasoning of the last sub-title, a contract good in the State or country of its inception is so also in every other the courts of which are called upon to enforce it, even though it would be void had it been entered into under the same forms in the latter locality.⁴ In this way, the domestic tribunal gives effect to rights which had accrued under the foreign law.⁵ For example, —

§ 1374. **Usury.** — The rates of interest, and the consequence of overstepping them, vary in our States. Thereupon, if a contract reserving interest is valid in a State where made, it will be enforced by the courts of another State wherein, had it been there entered into, it would be void for usury.⁶ So, —

bar, 82 Ill. 450; *Scoville v. Canfield*, 14 Johns. 338, 340.

¹ Ante, § 380.

² *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Bell v. Bruen*, 1 How. U. S. 169.

³ 2 Pars. Con. 570. This is also the formula of the books in regard to marriage. 1 Bishop Mar. & Div. § 355, 370, 390.

⁴ *Greenwood v. Curtis*, 6 Mass. 358; *Carnegie v. Morrison*, 2 Met. 381, 387,

389; *Stebbins v. Leowolf*, 3 Cush. 137; *Blanchard v. Russell*, 13 Mass. 1, 4; *In re Murray*, 3 Bankr. Reg. 765; *Adams v. Gay*, 19 Vt. 358; *Crosby v. Berger*, 3 Edw. Ch. 538; *Groves v. Nutt*, 13 La. An. 117; *Huey's Appeal*, 1 Grant, Pa. 51; *Fergusson v. Fyffe*, 8 Cl. & F. 121; *Cubbedge v. Napier*, 62 Ala. 518; *Foubert v. Turst*, 1 Bro. P. C. 129; *Lauten v. Rowan*, 59 N. H. 215.

⁵ Ante, § 1370, 1371.

⁶ *Philadelphia Loan Co. v. Towner*,

§ 1375. **Written or Oral.** — If, in a State where an oral contract is made, it is good, it will be enforced in another State or country the statutes whereof require the like contract to be in writing.¹ Again, —

§ 1376. **Sunday Contract.** — A Sunday contract, good by the law of the State where made, will be enforced in another State the statutes of which render the like bargaining invalid.²

§ 1377. **Distinction.** — There is a plain distinction between the simple enforcement in our courts of a foreign contract valid at home, notwithstanding it would have been invalid if made here, and permitting the parties to such a contract to come upon our soil and here do the thing which by our law is wrongful. No government will or should suffer this. On the other hand, the laws of every civilized country bind all persons, except foreign sovereigns and their agents, coming and being within its territorial jurisdiction.³ Out of this distinction grow some apparent —

13 Conn. 249; *De Wolf v. Johnson*, 10 Wheat. 367; *Commercial Bank v. King*, 2 La. An. 457; *Robb v. Halsey*, 11 Sm. & M. 140; *Davis v. Garr*, 2 Selden, 124; *Levy v. Levy*, 28 Smith, Pa. 507; *Scott v. Perlee*, 39 Ohio State, 63, 67.

¹ Story Conf. Laws, § 262; *Scudder v. Union National Bank*, 91 U. S. 406; *Forward v. Harris*, 30 Barb. 338; *Denny v. Williams*, 5 Allen, 1; *Carrington v. Brents*, 1 McLean, 167. Compare with post, § 1384. This doctrine is believed to apply as well to contracts voidable in the State or country in which their enforcement is sought as to those which are there void. Indeed, the bare statement would be startling, that we will recognize the validity of a foreign contract good at home, though our statutes pronounce the same sort of domestic contract void; yet, if our laws declare it *voidable*, we will hold it to be *void*. But an English court has actually taken this distinction; adjudging to be void such a contract, the terms of which were within the fourth section of the

English Statute of Frauds (ante, § 1232); while admitting that, if it were void instead of voidable by the English law, it would be tested by the foreign, and accepted in England as good. The reason assigned was, that this section of the Statute of Frauds pertains to the procedure (ante, § 1371), consequently is controlling as well in the case of a foreign as of a domestic contract. *Leroux v. Brown*, 12 C. B. 801, 16 Jur. 1021. It is submitted that, on a question of this sort, the reason of the distinction between law and procedure should govern rather than the mere formula of the doctrine; and, within the *reason* (ante, § 1371), as applied to the particular question, this section refers only to the domestic contract, and does not forbid the giving of effect to the *right* acquired under the foreign law.

² *Swann v. Swann*, 21 Fed. Rep. 299. See *Gauthier v. Cole*, 17 Fed. Rep. 716.

³ 1 Bishop Crim. Law, § 124-134; Bishop Written Laws, § 141.

§ 1378. **Exceptions to the above Rule.**—The exceptions are a little broader than the reason just stated indicates, it not quite covering the entire ground. They are stated to be “that,” to quote from Fowler, J., “contracts which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; which are against good morals, or against religion, or against public rights; and those opposed to the national policy or national institutions; are deemed nullities in every country affected by such considerations, though they may be valid by the laws of the place where they are made.”¹ For it is little else than repeating what has just been said to add, that no government will or should allow the welfare of its own subjects, or its own policy or interests, to be subverted by foreign laws.² Hence, —

§ 1379. **Evading.**—In an ordinary contracting, contrary in some degree to the rule in marriage,³ courts will not permit the laws under which they sit to be intentionally evaded or overridden. If, therefore, parties in one State make a contract which in its nature must be performed in another, — or which, in fact, they mean shall be so performed, as shown by its terms, or otherwise, — the tribunals of the latter locality will not give it effect, unless it is valid as tested by their own domestic laws.⁴ For example, —

§ 1380. **Smuggling Contract.**—A contract made abroad, to smuggle dutiable goods into the United States, will be treated as void by our courts.⁵

¹ Bliss v. Brainard, 41 N. H. 256, 261; copying, in substance, from Story Conf. Laws, § 244.

² 2 Bishop Mar. Women, § 577; Commonwealth v. Aves, 18 Pick. 193; Smith v. Godfrey, 8 Fost. N. H. 379; Davis v. Bronson, 6 Iowa, 410; Phinney v. Baldwin, 16 Ill. 108; Chewning v. Johnson, 5 La. An. 678; Greenwood v. Curtis, 6 Mass. 358, 377; Windsor v. Jacob, 2 Tyler, 192; Donovan v. Pitcher, 53 Ala. 411; Rousillon v. Rousillon, 14 Ch. D. 351; Hope v. Hope, 8 De G. M. & G. 731, 3 Jur. n. s. 454; Union, &c. Co. v. Erie Railway, 8 Vroom, 23; Klinck v. Price, 4 W. Va. 4; Fenton

v. Livingstone, 3 Macq. H. L. Cas. 497.

³ 1 Bishop Mar. & Div. § 355-389; 2 Bishop Mar. Women, § 579 et seq.

⁴ Lewis v. Headley, 36 Ill. 433; Carneal v. Day, Litt. Sel. Cas. 492; Maguire v. Pingree, 30 Maine, 508; Kanaga v. Taylor, 7 Ohio State, 134, 142; Thompson v. Ketcham, 4 Johns. 285; McCandlish v. Cruger, 2 Bay, 377; Jewell v. Wright, 30 N. Y. 259; Touro v. Cassin, 1 Nott & McC. 173; Stricker v. Tinkham, 35 Ga. 176; Wooten v. Miller, 7 Sm. & M. 380.

⁵ Story Conf. Laws, § 246, referring to Holman v. Johnson, Cowp. 341;

§ 1381. **Champerty.** — If, in France where champerty is permitted, an American lawyer bargains to carry on a suit in one of our States wherein it is unlawful, to receive for his compensation one half of what he gets, the courts of such State will give no effect to the contract.¹ Still, —

§ 1382. **Place of Performance.** — The mere fact that the place meant for the performance of a contract is in another State does not render it invalid in the latter. It is so if violative of the law or policy there prevailing, otherwise it is good.²

§ 1383. *Invalid where made : —*

Invalid everywhere. — Since a contract, to be of any effect, must have the mutual consent of the parties³ and the approval of the law,⁴ it follows that, whatever form of contracting persons enter into, if the law of the place where they do it pronounces it not to be a mutual consent, or if otherwise it holds such act to be void, the courts of another State or country cannot afterward adjudge the thing thus ineffectually done to be a contract, however they might regard it had it transpired within their own jurisdiction. Hence the doctrine that a contract void in the State or country where made is void everywhere.⁵ If there are cases in apparent exception to this rule, they are not really so; for, from the nature of the rule, it, unlike its counterpart,⁶ does not admit of exceptions.⁷ Probably this rule would have no relation to a con-

Armstrong v. Toler, 11 Wheat. 258;

Cambioso v. Maffet, 2 Wash. C. C. 98.

¹ Grell v. Levy, 16 C. B. N. S. 73, 10 Jur. N. S. 210.

² Williams v. Carr, 80 N. C. 294; Campbell v. Crampton, 2 Fed. Rep. 417; Maine v. Butler, 130 Mass. 196, Warner v. Jaffray, 96 N. Y. 248; Flagg v. Baldwin, 11 Stew. Ch. 219; Davis v. Trevanion, 2 Dowl. & L. 743, 9 Jur. 492; Davis v. Bronson, 6 Iowa, 410; Fitzsimons v. Guanahani, 16 S. C. 192; In re Paige, &c. Lumber Co. 31 Minn. 136; Carnahan v. Western Union Tel. Co. 89 Ind. 626.

³ Ante, § 313.

⁴ Ante, § 469-490.

⁵ Ante, § 1372.

⁶ Ante, § 1373, 1378.

⁷ Bliss v. Brainard, 41 N. H. 256, 261; Dunscomb v. Bunker, 2 Met. 8; Palmer v. Yarrington, 1 Ohio State, 253, 261; Shelton v. Marshall, 16 Texas, 344, 353; Morris Run Coal Co. v. Barclay Coal Co. 18 Smith, Pa. 173; Ford v. Buckeye State Ins. Co. 6 Bush, 133; Moore v. Clopton, 22 Ark. 125; McAllister v. Smith, 17 Ill. 328; Titus v. Scantling, 4 Blackf. 89; Pearl v. Hansborough, 9 Humph. 426; Thompson v. Ketcham, 8 Johns. 190; Dacosta v. Davis, 4 Zab. 319; Kennedy v. Cochrane, 65 Maine, 594.

tracting done at a place wherein, if we can imagine it, there is no law.¹ To illustrate, —

§ 1384. **Void as Verbal.** — If, where an agreement is made, it is void by the Statute of Frauds because not in writing, it will be so also in another State by the differing laws whereof it would be good had it been entered into there.² And, —

§ 1385. **Foreign Indorsement.** — Where a bill of exchange has been indorsed abroad, in a form which would pass the title if it had been done here, yet inadequate by the foreign law, the holder cannot maintain upon it a suit in our courts.³ Again, —

§ 1386. **Unstamped — (Revenue Laws).** — A contract void in the country where made, because not stamped, is void also in every other in which its enforcement is sought.⁴ At the same time, the statutes requiring stamps are revenue laws; and we often read that the courts of one country will not recognize the revenue laws of another.⁵ The true distinction as to which appears to be, that, though parties bargain in one country to violate the revenue laws of another, yet, if the thing to be done is not otherwise immoral or against public policy, the agreement will be upheld in the former country.⁶ But, whenever a contract is void in the country of its inception, though only from the want of the stamp required by the revenue laws, it will be so also in every other.⁷ Another expression of one branch of this doctrine is, that, —

¹ 1 Bishop Crim. Law, § 5, 7, 9–11.

² Allshouse v. Ramsay, 6 Whart. 331.

Compare with ante, § 1375.

³ Trimby v. Vignier, 1 Bing. N. C. 151, 4 Moore & S. 695, 6 Car. & P. 25. See Roosa v. Crist, 17 Ill. 450; Woods v. Ridley, 11 Humph. 194; Hirschfeld v. Smith, Law Rep. 1 C. P. 340; Levy v. Levy, 28 Smith, Pa. 507; Dundas v. Bowler, 3 McLean, 397; Carlisle v. Chambers, 4 Bush, 268; Trabue v. Short, 18 La. An. 257; Dow v. Rowell, 12 N. H. 49; Lee v. Selleck, 33 N. Y. 615; Hatcher v. McMorine, 4 Dev. 122; King v. Doolittle, 1 Head, 77; Stanford

v. Pruet, 27 Ga. 243; Young v. Harris, 14 B. Monr. 556.

⁴ Alves v. Hodgson, 7 T. R. 241, 2 Esp. 528; Bristow v. Sequeville, 5 Exch. 275; Clegg v. Levy, 3 Camp. 166. See Wynne v. Jackson, 2 Russ. 351; Skinner v. Tinker, 34 Barb. 333.

⁵ Ivey v. Lalland, 42 Missis. 444; Kohn v. The Renaissance, 5 La. An. 25.

⁶ 2 Pars. Con. 5th ed. 754; 2 Chit. Con. 11th Am. ed. 987; Merchants Bank v. Spalding, 5 Selden, 53, 63; Kohn v. The Renaissance, supra; Armendiaz v. Serna, 40 Texas, 291.

⁷ Alves v. Hodgson, supra, at p. 243 of 7 T. R.

§ 1387. **Valid here, against Foreign Law.** — Looking into the conflicting and somewhat indistinct adjudications, it is believed that we may derive from them, and from the reasons on which they proceed, the following. Within limits not well defined, yet perhaps embracing most cases where the thing is not *malum in se*, and is not contrary to natural right, our courts will enforce a contract made here to do abroad what violates the law of the foreign country, if in harmony with our own law.¹ Still, in just principle, this or any other like doctrine derived from international law,² must be subordinate to the domestic rule concerning contracts to do what the law forbids;³ which law is, as to the present question, that of the foreign country. Moreover, in just principle, it does not seem quite commendable for our tribunals to enforce bargains to do, within the territory of a foreign friendly power, acts violative of any law there prevailing, however innocent as judged by our own law or by natural right. To continue our illustrations, —

§ 1388. **Usury.** — Parties, contracting in a State whose laws make void a promise to pay more than six per cent interest, may there validly bargain for more, payable in another State where the higher rate is lawful. Such a contract, not intended to evade the law of the place of its inception, is good in both States.⁴ Beyond this, if the agreed interest is lawful in the State where the bargain is entered into, the courts of this State, it appears, will enforce the contract, though the

¹ I do not think that any very accurate defining of this doctrine, simply upon the authorities, is possible. The reader may consult, besides the cases cited to the last section and the next, the following: *Merchants Bank v. Spalding*, 5 Selden, 53; *Pearl v. Hansborough*, 9 Humph. 426; *De Wutz v. Hendricks*, 9 Moore, 586, 2 Bing. 314; *Smith v. Marconnay*, Peake Ad. Cas. 81; *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589; *Ormes v. Dauchy*, 82 N. Y. 443; *Adams v. Clutterbuck*, 10 Q. B. D. 403; *Hunt v. Jones*, 12 R. I. 265; *Fitch v. Remer*, 1 Flip. 15.

² Ante, § 1370, 1371.

³ Ante, § 583, 594, 595.

⁴ *Junction Railroad v. Ashland Bank*, 12 Wal. 226; *Parham v. Pulliam*, 5 Coldw. 497; *Martin v. Martin*, 1 Sm. & M. 176; *Senter v. Bowman*, 5 Heisk. 14, 16; *Duncan v. Helm*, 22 La. An. 418; *Miller v. Tiffany*, 1 Wal. 298; *Pratt v. Adams*, 7 Paige, 615; *Roberts v. McNeely*, 7 Jones, N. C. 506; *Smith v. Muncie National Bank*, 29 Ind. 158; *Arnold v. Potter*, 22 Iowa, 194; *Kennedy v. Knight*, 21 Wis. 340; *Robb v. Halsey*, 11 Sm. & M. 140; *National Bank v. Smoot*, 2 MacAr. 371; *Cockle v. Flack*, 93 U. S. 344.

payment is by its terms to transpire in another State where it is unlawful.¹

§ 1389. *What the Place of Contract : —*

Partly in each of Two States. — Where the preliminaries of a contract and its formal execution have occurred partly in each of two or more States, its place of making is, as a sort of general rule, that at which, by delivery or otherwise, it first becomes a contract.² For example, since ordinarily it is delivery which gives effect to the writing,³ a contract is commonly deemed to have been made in the State where the delivery took place, without reference to where it was written and signed.⁴ But, in many cases, this rule is inadequate, or its pointings are not readily understood; then the court will look into the preliminaries, the surroundings of the parties, their domicil, the words, the nature of the contracting, and the like, from which combined whole it will deduce the result.⁵ No minor rules on this question could be of much practical help.

III. *The Interpretation and Effect of the Contract.*

§ 1390. **The Rule.** — The interpretation and consequent effect of a contract are determined by the law of the State or

¹ Thornton v. Dean, 19 S. C. 583; Pancoast v. Travellers Ins. Co. 79 Ind. 172. See Richardson v. Brown, 9 Baxter, 242; Lindsay v. Hill, 66 Maine, 212; Sheldon v. Haxtun, 91 N. Y. 124.

² Northampton Live-stock Ins. Co. v. Tuttle, 11 Vroom, 476; Providence, &c. Bank v. Frost, 14 Blatch. 233; Waldron v. Ritchings, 9 Abb. Pr. n. s. 359; Northwestern Mut. Life Ins. Co. v. Elliott, 7 Saw. 17.

³ Ante, § 113, 349.

⁴ Cromwell v. Royal Canadian Ins. Co. 49 Md. 366; Ames v. McCamber, 124 Mass. 85; Milliken v. Pratt, 125 Mass. 374; Overton v. Bolton, 9 Heisk. 762; Hart v. Wills, 52 Iowa, 56; Gay v. Rainey, 89 Ill. 221; Young v. Harris,

14 B. Monr. 556; Bell v. Packard, 69 Maine, 105.

⁵ The reports are full of illustrative cases; for example, Campbell v. Crampton, 18 Blatch. 150; Backhouse v. Selden, 29 Grat. 581; Horne v. Rouquette, 3 Q. B. D. 514; Fuller v. Leet, 59 N. H. 163; Bush v. Nance, 61 Missis. 237; Sherley v. McCormick, 135 Mass. 126; Shattuck v. Mutual Life Ins. Co. 4 Clif. 598; Mills v. Wilson, 7 Norris, Pa. 118; Webber v. Howe, 36 Mich. 150; Rindskopf v. De Ruyter, 39 Mich. 1; Thompson v. Edwards, 85 Ind. 414; Mack v. Lee, 13 R. I. 293; Frierson v. Galbraith, 12 Lea, 129; Patterson v. Carrell, 60 Ind. 128; Lewis v. McCabe, 49 Conn. 141; Commercial Bank v. Varnum, 49 N. Y. 269.

country wherein, at the time of its making,¹ the parties intend it to be performed; as evidenced by its terms,² by its nature,³ by the surroundings, or anything else permissible to be shown.⁴ This rule applies equally to contracts entered into in a locality other than that of the intended performance,⁵ and in the same locality.⁶ Further to explain, —

§ 1391. **Place of Making.** — In the absence of anything indicating the contrary, the place of the making of a contract is presumptively that of its performance, by the law whereof it is to be interpreted and its effect defined.⁷

§ 1392. **Intended Performance elsewhere.** — Whether mere oral evidence, where the writing is silent, is admissible to rebut this presumption, and show an intent to perform in another State or country, is a question perhaps not absolutely settled. In reason, and within a principle disclosed in another chapter,⁸ as such evidence does not contradict the terms of such contract, and is a help to the real meaning,⁹ it would seem to be admissible; and this is believed to be the better doctrine in authority.¹⁰ Further as to the —

§ 1393. **Place of Performance.** — On a promise to pay money, the place at which the payment is to be made is that of the

¹ *Hollomon v. Hollomon*, 12 La. An. 607.

² *Goddin v. Shipley*, 7 B. Monr. 575; *Broadhead v. Noyes*, 9 Misso. 56; *Dorsey v. Hardesty*, 9 Misso. 157; *Sherman v. Gassett*, 4 Gilman, 521.

³ Post, § 1393-1397.

⁴ *Cox v. United States*, 6 Pet. 172, 203; *Robinson v. Bland*, 2 Bur. 1077, 1078, 1 W. Bl. 256, 259; *Bell v. Bruen*, 1 How. U. S. 169; *Pritchard v. Norton*, 106 U. S. 124; *Don v. Lippmann*, 5 Cl. & F. 1; *Brown v. Camden, &c. Railroad*, 2 Norris, Pa. 316.

⁵ *Cox v. United States*, supra; *De La Vega v. Vianna*, 1 B. & Ad. 284; *Carnegie v. Morrison*, 2 Met. 381, 389; *Howard v. Branner*, 23 La. An. 369; *Allen v. Bratton*, 47 Missis. 119; *Herschfeld v. Dexel*, 12 Ga. 582; *Boyd v. Ellis*, 11 Iowa, 97; *Dunn v. Welsh*, 62 Ga. 241.

⁶ *Benners v. Clemens*, 8 Smith, Pa. 24; *Golson v. Ebert*, 52 Misso. 260; *Griffin v. Inman*, 57 Ga. 370.

⁷ *Cook v. Moffat*, 5 How. U. S. 295; *United States Bank v. Donnally*, 8 Pet. 361; *Gibbs v. Fremont*, 9 Exch. 25, 17 Jur. 820; *De Sobry v. De Laistre*, 2 Har. & J. 191; *Benners v. Clemens*, 8 Smith, Pa. 24; *Campbell v. Nichols*, 4 Vroom, 81; *Hyatt v. Bank of Ky.* 8 Bush, 193; *Milwaukee, &c. Railway v. Smith*, 74 Ill. 197; *Oregon, &c. Trust Co. v. Rathbun*, 5 Saw. 32.

⁸ Ante, § 1082, 1084.

⁹ Ante, § 370-376, 380.

¹⁰ *Thompson v. Ketcham*, 4 Johns. 285; *Anderson v. Drake*, 14 Johns. 114; *Fisher v. Otis*, 3 Chand. 83; *Brown v. Freeland*, 34 Missis. 181. And see the cases cited to the last two sections. *Hyatt v. Bank of Ky.* 8 Bush, 193, seems adverse.

performance.¹ Thus, a bill drawn in Ireland and payable England can be discharged only in English money.² An bond, executed in New York, to indemnify one for becoming surety in a Louisiana suit, being, by its necessary operation payable in Louisiana, takes its effect from the Louisiana law. In like manner, the bond of an officer of the United States, such as a navy agent, though executed in Louisiana, is construed by the common law prevailing at Washington.⁴

§ 1394. **Two Localities — (Land).** — Under the foregoing rule, the interpretation of some contracts will be in part by the law of one State and in part by that of another.⁵ An instance occurs where parties in one State bargain for the purchase and sale of land in another, — and the money is to be paid in the former State, while the conveyance is necessarily in the latter, — the law of the latter will regulate the question of title, and of the former the question of the effect of a failure of consideration.⁶

§ 1395. **Real Estate,** — being a part of the country itself, is almost of necessity, and always by the common-law rule, held and transmissible, whether through grant or inheritance, exclusively by the law of the State or country where it is situated.⁷ Therefore a deed or mortgage of land is to be interpreted and its effect determined by the law of the country where the land lies, and it takes its effect solely from the law there prevailing.

¹ *Hirschfeld v. Smith*, Law Rep. 1 C. P. 340; *Allen v. Merchants Bank*, 22 Wend. 215; *Bowen v. Newell*, 3 Kernan, 290; *Blodgett v. Durgin*, 32 Vt. 361; *Robinson v. Bland*, 1 W. Bl. 234, 256, 258; *Oregon, &c. Trust Co. v. Rathbun*, 5 Saw. 32; *Rothschild v. Currie*, 1 Q. B. 43; *Gaylord v. Johnson*, 5 McLean, 448.

² *Taylor v. Booth*, 1 Car. & P. 286. Compare with *Joslin v. Miller*, 14 Neb. 91, 93; *Howenstein v. Barnes*, 5 Dil. 482; *Cooper v. Waldegrave*, 2 Beav. 282.

³ *Pritchard v. Norton*, 106 U. S. 124.

⁴ *Cox v. United States*, 6 Pet. 172; *Duncan v. United States*, 7 Pet. 435.

⁵ *Pomeroy v. Ainsworth*, 22 Barb.

118. See *Mississippi, &c. Railway v. United States Exp. Co.* 81 Ill. 534.

⁶ *Glenn v. Thistle*, 23 Miss. 5. And see *Phelps v. Decker*, 10 Mass. 2; *Kelly v. Davis*, 28 La. An. 773; *Morgan v. New Orleans Railroad*, 2 Woods, 1.

⁷ *Brodie v. Barry*, 2 Ves. & B. 131; *Elliott v. Minto*, 6 Madd. 131; *Brine v. Insurance Co.* 96 U. S. 6; *Keegan v. Geraghty*, 101 Ill. 26; *Kelly v. Sejour*, 4 La. An. 128; *Clopton v. Booker*, 27 Ark. 482; 2 *Bishop v. Women*, § 575.

⁸ *Cantu v. Bennett*, 39 Texas, 8; *Danner v. Brewer*, 69 Ala. 191; *Phelps v. Decker*, 10 Mass. 267; *Heyer v. Anderson*, 108 Ill. 385. Otherwise in *Braska, Hoadley v. Stephens*, 4 Neb. 4.

For example, by this law it is determinable whether or not a covenant in a conveyance runs with the land.¹ And—

§ 1396. **Infant Grantor** — (**Realty — Personalty**). — A girl between eighteen and twenty-one, who is of age by the law of the State where she resides,² can give no greater effect to her deed of land situated in another State in which the common law of majority prevails, than can one of the same age whose domicil is there.³ But she can validly convey her personal effects, being without *situs*, though they happen to be in the latter State.⁴

§ 1397. **Personal Estate**. — Personal property has, in law, no *situs*; so any conveyance of it, good where made, will transmit the ownership, though it is lying in another State where different forms are required.⁵ A part or all of our States admit to this rule some not well defined exceptions, whereby special sorts of personal property are put on a footing analogous to real.⁶ And, in reason, the rule that a contract is to have the effect given it by the law of the place of its contemplated performance⁷ would seem necessarily to create, at least, apparent exceptions. Again, —

§ 1398. **Connected with Real**. — As affecting real estate, there are many contracts which are deemed personal; to be governed, therefore, by the law of the State where made, and to be enforced in any locality.⁸

IV. *The Discharge of the Contract.*

§ 1399. **By the Party**. — There is no ground for question, and probably it has never been doubted, that, in the absence

¹ Fisher v. Parry, 68 Ind. 465.

² Ante, § 893.

³ Barnum v. Barnum, 42 Md. 251.
And see White v. Howard, 46 N. Y. 144;
The State v. Bunce, 65 Misso. 349.

⁴ Huey's Appeal, 1 Grant, Pa. 51.

⁵ Partee v. Silliman, 44 Missis. 272;
Cantu v. Bennett, 39 Texas, 303; Ames
Iron Works v. Warren, 76 Ind. 512.

⁶ Hallgarten v. Oldham, 135 Mass.
1; Clark v. Tarbell, 58 N. H. 88.

⁷ Ante, § 1390.

⁸ Gardner v. Ogden, 22 N. Y. 327;
Mott v. Coddington, 1 Rob. N. Y. 267;
Jackson v. Hanna, 8 Jones, N. C. 188;
New York v. Dawson, 2 Johns. Cas.
335; Low v. Hallett, 2 Caines, 374;
Henwood v. Cheeseman, 3 S. & R.
500, 503; Osmond v. Flournoy, 34 Ga.
509; Doulson v. Matthews, 4 T. R.
503.

of special circumstances,¹ any discharge by the promisee to the promisor, validly executed according to the law of the place where given, operates as a release of an executory contract everywhere. If we please, we may deem such discharge a new contract; good, therefore, within a rule before stated.²

§ 1400. **By the Law.** — When the law undertakes to discharge a contract, without the concurrent act of the parties, the element which their mutual presence supplies must be added; namely, a jurisdiction. Under the familiar principle that laws have inherently no extra-territorial force,³ a contract within the exclusive jurisdiction of one country cannot, in the absence of any mutual moving from the parties, be discharged by the law of another. It is impossible to formulate in language a rule for the jurisdiction, universally correct and applicable to all cases. The author, in “Marriage and Divorce,” has explained the jurisdiction for dissolving marriage, — a matter depending on many complications of things, not possible to be stated in a sentence. So —

§ 1401. **Bankruptcy Laws,** — discharging debtors on the surrender of their property without the consent of their creditors, cannot operate on every contract, wherever made, and whoever the parties. This is a question involving many details, and it would be vain to enter into it here, with our limited space.⁴

¹ *Greenwald v. Kaster*, 5 Norris, Pa. 45.

² Ante, § 1371-1373.

³ *Bishop Written Laws*, § 141; *Blanchard v. Russell*, 13 Mass. 1, 4; *Augusta Bank v. Earle*, 13 Pet. 519; *Campbell v. Hall*, Cowp. 204, 208; *In re Pulsifer*, 14 Fed. Rep. 247; *Drew v. Smith*, 59 Maine, 393; *State Bank v. Plainfield Bank*, 7 Stew. Ch. 450.

⁴ See Met. Con. 317 et seq. In *Ellis v. McHenry*, Law Rep. 6 C. P. 228, 234, Bovill, C. J. states the English doctrine to be, that, first, “a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the

debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries.” Referring to *Burrows v. Jemino*, 2 Stra. 733; *Ballantine v. Golding*, Cooke’s Bk. Law, 499; *Potter v. Brown*, 5 East, 124; *Odwin v. Forbes*, Buck, 57; *Quelin v. Moisson*, 1 Knapp, 266, note; *Gardiner v. Houghton*, 2 B. & S. 743; *Phillips v. Eyre*, Law Rep. 6 Q. B. 1, 28. “Secondly, as a general proposition, . . . the discharge of a

§ 1402. **Common Formula.** — The general doctrine is commonly stated in the books to be, that a contract discharged by the law of the State or country in which it was made, and where it was meant to be performed, is no longer binding elsewhere;¹ and, on the other hand, that one discharged by the law of a place where it was not made or to be performed, will not be treated as dissolved in any other State or country.² The latter clause is true in most circumstances, not all.³ And neither clause is practically a perfect guide for all cases. Unless we could occupy a volume with this subject, little would be gained by further particularization.

V. *The Procedure for the Enforcement of the Contract.*

§ 1403. **The Rule.** — Every court has its own procedure, to which litigants must conform, whatever the origin of the cause of action.⁴ So that, though the *lex loci*, as it is termed, regulates the right under a foreign contract, the *lex fori* gives the remedy; in other words, the proceedings to enforce the right acquired abroad are the same as though it were domestic.⁵ And if, from the peculiar nature of the right, there is

debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country." Referring to *Smith v. Buchanan*, 1 East, 6; *Lewis v. Owen*, 4 B. & Ald. 654; *Phillips v. Allan*, 8 B. & C. 477; *Bartley v. Hodges*, 1 B. & S. 375. "But, thirdly, where [as in the case of England and her colonies] the discharge is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case." In our States, this question is further complicated by the provision of the United States Constitution against impairing the ob-

ligation of contracts, and the interpretations of it, explained ante, § 550 et seq.

¹ *Warder v. Arell*, 2 Wash. Va. 282; *Blanchard v. Russell*, 13 Mass. 1; *Green v. Sarmiento*, Pet. C. C. 74; *Poe v. Duck*, 5 Md. 1; *Le Roy v. Crowninshield*, 2 Mason, 151; *Lewis v. Woodfolk*, 2 Baxter, 25.

² Story Conf. Laws, § 342.

³ *Prentiss v. Savage*, 13 Mass. 20; *Ingraham v. Geyer*, 13 Mass. 146; *Tappan v. Poor*, 15 Mass. 419.

⁴ Ante, § 1371.

⁵ *Laird v. Hodges*, 26 Ark. 356; *Alexandria Canal v. Swann*, 5 How. U. S. 83; *Smith v. Atwood*, 3 McLean, 545; *McKissick v. McKissick*, 6 Humph. 75; *Partee v. Silliman*, 44 Missis. 272; *Don v. Lippmann*, 5 Cl. & F. 1; *Scoville v. Canfield*, 14 Johns. 338; *Mathuson v. Crawford*, 4 McLean, 540; *Broadhead*

no adequate procedure known to the court, the contract is practically be null.¹ To illustrate, —

§ 1404. **Specialty or Simple.** — On a contract in a form be a specialty where made, but not where its enforcement sought, or the reverse, — as, if the signature is followed by scroll, which in some States is by law a seal and in other not,² — the suit must be in the form³ prescribed by the law of the court entertaining it, for the sort of contract to which by this law it is classed.⁴ Or, —

§ 1405. **Arrest.** — If, by the law of the place of the contract, the party to be sued cannot be arrested or imprisoned or if he has there been freed from his original liability to arrest, — as, under insolvent laws which discharge the person of the debtor but not the debt, — he may be arrested in suit upon it in another State or country, where arrest is permitted by the general law.⁵ Again, —

§ 1406. **Corporation or Partners.** — Persons are to be sued as a corporation or as partners, according as they are the corporation or the other by the law of the place of the suit, not of the contract.⁶ And, —

§ 1407. **Interest.** — If interest is adjudged as damages, not speaking now of interest payable under the contract, the rate will be governed by the law of the place of the suit. Even, in an action upon a judgment rendered in another State, and specifying its rate of interest, the court, disregarding

v. Noyes, 9 Misso. 56; *Andrews v. Herriot*, 4 Cow. 508; *London, &c. Railway v. Lindsay*, 3 Macq. H. L. Cas. 99, 4 Jur. n. s. 343; *Mineral Point Railroad v. Barron*, 83 Ill. 365; *Denny v. Faulkner*, 22 Kan. 89.

¹ 2 Bishop Mar. Women, § 565, 567; *Commonwealth v. Holloway*, 1 S. & R. 392. And see *Lessley v. Phipps*, 49 Missis. 790.

² Ante, § 111.

³ *The State v. Thompson*, 49 Misso. 188.

⁴ *Le Roy v. Beard*, 8 How. U. S. 451; *McClees v. Burt*, 5 Met. 198; *Andrews v. Herriot*, 4 Cow. 508; *Trasher v. Everhart*, 3 Gill & J. 234; *Warren v.*

Lynch, 5 Johns. 239; *United States Bank v. Donnally*, 8 Pet. 361; *Douglas v. Oldham*, 6 N. H. 150. And see *Vinson v. Brewster*, 1 Barr. 381; *Adams Kerr*, 1 B. & P. 360.

⁵ *Ayres v. Audubon*, 2 Hill, S. 601; *Whittemore v. Adams*, 2 Cow. 6; *De La Vega v. Vianna*, 1 B. & Ad. 2; *Imlay v. Ellefsen*, 2 East, 453.

⁶ *Liverpool Ins. Co. v. Massachusetts*, 10 Wal. 566; *Taft v. Ward*, 106 Mass. 518; *Gott v. Dinsmore*, 111 Mass. 51. See *Bullock v. Caird*, Law Rep. Q. B. 276.

⁷ *Goddard v. Foster*, 17 Wal. 143.

ing this part of it, will give the interest-damages which the domestic law provides.¹ So —

§ 1408. **Set-off.** — A set-off, not permissible under the procedure of the courts where the contract arose, is good in defence if in accord with the law of the forum.² Also —

§ 1409. **Statutes of Limitation** — pertain, not to the right, but to the remedy. Therefore a domestic suit to vindicate a foreign right is governed, not by the foreign statute, but by the domestic.³ This doctrine is by most courts carried so far that, even though the statute of the State in which the demand originated, and the parties resided, has fully run against it, the aggrieved party may effectually sue the other, if he can serve process upon him, in any other State or country by whose laws the action is not likewise barred,⁴ — a conclusion in some of the States reversed by special terms of statutes.⁵ Now, —

§ 1410. **Further as to which.** — It has been adjudged, apparently without dissent, that the complete running of the statute creates a vested right in the party, which, under our American constitutions, it is not competent for legislation to impair by authorizing a suit on the barred claim.⁶ Since, therefore, not even the legislative power of the State where the right has vested and the parties are domiciled can take it away, by what sort of “comity of nations”⁷ do the courts of another State proceed when, fastening their fangs upon the party, they strip him of what our constitutions secure to him in the State of his domicile? Moreover, even if this were not so, “comity” would not seem, in reason, to dictate the

¹ *Clark v. Child*, 136 Mass. 344, 348.

² *Davis v. Morton*, 5 Bush, 160, 164; *Second Nat. Bank v. Hemingray*, 31 Ohio State, 168.

³ 2 Kent Com. 462, 463.

⁴ *British Linen Co. v. Drummond*, 10 B. & C. 903; *Byrne v. Crowninshield*, 17 Mass. 55; *Jones v. Jones*, 18 Ala. 248; *Ruggles v. Keeler*, 3 Johns. 263; *Pegram v. Williams*, 4 Rich. 219; *Watson v. Brewster*, 1 Barr, 381; *Aldrich v. Aldrich*, 56 Vt. 324; *Sawyer v. Macaulay*, 18 S. C. 543; *Miller v. Brenham*,

68 N. Y. 83, 87, 88; *Thompson v. Reed*, 75 Maine, 404, 406, 407. See *Norton v. Sterling*, 15 La. An. 399; *Petchell v. Hopkins*, 19 Iowa, 531; *Hale v. Lawrence*, 1 Zab. 714.

⁵ *Osgood v. Artt*, 11 Bis. 160; *Davis v. Harper*, 48 Iowa, 513; *McArthur v. Goddin*, 12 Bush, 274; *Humphrey v. Cole*, 14 Bradw. 56; *Minniece v. Jeter*, 65 Ala. 222.

⁶ *Bishop Stat. Crimes*, § 265.

⁷ *Ante*, § 1370.

enforcing, in our tribunals, of a foreign demand, which the foreign court itself would by its own law be forbidden to entertain. This view which, it is submitted, is correct in principle, would not preclude the following of the domestic statute as to claims not fully barred by the foreign law.

§ 1411. **Right Extinguished.** — We have intimations that, if a statute like this of limitations operates to extinguish the right in the country where it arises and the parties are domiciled, the courts of another jurisdiction will not thereafter give it effect.¹

§ 1412. *The Doctrine of this Chapter restated.*

A judicial tribunal should, in the decision of every question, follow the laws prescribed for it by the sovereignty under which it sits. But there is a comity of nations, as the term is, whereby it has become customary for the various governmental powers to respect one another's laws; so that, if a contract made in one country is drawn in question in another, the tribunals of the latter will, in the absence of any domestic rule or policy restraining, accept the foreign law as the domestic, for ascertaining its validity.² But this rule stops short at every point where it would become subversive of the domestic law. The interpretation and effect of the contract are determined by the law of the place of its intended performance, whether at home or abroad; its discharge, when by operation of law, by any law moving thereto, and having a jurisdiction over it. In enforcing the contract, the foreign procedure is never employed; because courts must have their own, and it would be both inconvenient and subversive of domestic justice to adopt the foreign forms.

¹ Story Conf. Laws, § 582; 2 Pars. Con. 591, note; *McMerty v. Morrison*, 62 Misso. 140.

² 1 Bishop Mar. & Div. § 367.

BOOK V.

THE BREACH AND PERFORMANCE OF THE
CONTRACT.

CHAPTER LV.

WHAT IS A BREACH AUTHORIZING A SUIT AT LAW.

§ 1413. Introduction.

1414-1418. In General.

1419-1424. As to Plaintiff.

1425-1432. As to Defendant.

1433-1439. Further Questions.

1440. Doctrine of Chapter restated.

§ 1413. **How Chapter divided.** — We shall consider this subject, I. In General; II. As to the Plaintiff; III. As to the Defendant; IV. Further Questions.

I. *In General.*

§ 1414. **Elsewhere — Here.** — In a series of chapters in another connection,¹ are explained the alteration of the contract, its rescission, ratification, release, and the doctrine of election and waiver relating thereto. We are here to contemplate the finished, final agreement, unrescinded.² In the next chapter, we shall see something of rights conferred by a partial or imperfect execution of a contract which still is altogether or in part broken.

§ 1415. **Interpret.** — In every judicial controversy under a

¹ Ante, § 745-879.

² *Hughes v. Prewitt*, 5 Texas, 264.

contract, it, like the law,¹ must be interpreted. And the interpreted contract, not the mere words of the bargaining, is what the court enforces. Therefore, to ascertain whether there has been a breach, or a performance, or neither, we must first interpret the agreement,—the leading rules for which have already been stated.² To illustrate, —

§ 1416. **Employer and Employee.** — Whenever one enters into another's service, whether in a continuous employment or for the doing of a particular thing, the law, interpreting the contract, adds to its general words, in the absence of special ones, or of special facts controlling the particular case, his promise to bring to the work ordinary skill and capacity, together with integrity therein, and faithfulness to the interests of his employer; the sort of skill varying with the nature of the business, and the holding out of the employee.³ Thus, a physician, surgeon, or dentist undertakes, in law, to supplement his reasonable care and honest endeavors with ordinary professional skill,⁴ yet does not warrant success or a cure.⁵ A workman by the day, or any other within the like reason, impliedly promises, in addition to the care common to all, not the skill of the medical man, but such as is required for the particular employment, in the ordinary degree.⁶ The clerk in a store, or other like employee, undertakes, among other things, to transact business with reasonable accuracy and fidelity, and otherwise to adjust his conduct to the interests of his employer.⁷ Now, —

§ 1417. **Effect of Interpretation.** — To continue our illustrations from the law of employer and employee, these and

¹ Bishop Written Laws, § 71.

² Ante, § 365 et seq.

³ Ante, § 246; *Page v. Wells*, 37 Mich. 415; *Keith v. Bliss*, 10 Bradw. 424; *Harmer v. Cornelius*, 5 C. B. N. S. 236, 4 Jur. N. S. 1110; *Newman v. Reagan*, 65 Ga. 512; *Brink v. Fay*, 7 Daly, 562; *Griffin v. Haynes*, 24 La. An. 480; *Waugh v. Shunk*, 8 Harris, Pa. 130.

⁴ *Hathorn v. Richmond*, 48 Vt. 557; *Utey v. Burns*, 70 Ill. 162; *Landon v. Humphrey*, 9 Conn. 209; *Wood v.*

Clapp, 4 Sneed, Tenn. 65; *Long v. Morrison*, 14 Ind. 595; *Craig v. Chambers*, 17 Ohio State, 253; *Simonds v. Henry*, 39 Maine, 155; *Higgins v. McCabe*, 126 Mass. 13, 20.

⁵ *O'Hara v. Wells*, 14 Neb. 403; *Bogle v. Winslow*, 5 Philad. 136.

⁶ *Eaton v. Woolly*, 28 Wis. 628; *Parker v. Platt*, 74 Ill. 430.

⁷ *Griffin v. Haynes*, 24 La. An. 480; *Brink v. Fay*, 7 Daly, 562; *Newman v. Reagan*, 65 Ga. 512.

numerous other implied stipulations, introduced into the contract by interpretation, are of precisely the same effect as though written into it in terms.¹ For example, a breach of such a stipulation, the same as of one in oral or written words, may furnish ground for rescinding the contract,² as where a master discharges his servant;³ or for a suit upon it, or to obtain recompense for an injury inflicted in improperly carrying it out;⁴ or for precluding a plaintiff from recovering a verdict, or for reducing it, by reason of the imperfection or failure of performance on his part.⁵

§ 1418. **Elements of Suit.**—To the success of a lawsuit, two elements are always essential; namely, a right in the plaintiff, and a correlative wrong in the defendant. And the plaintiff must be without fault in the thing of which he complains, and the defendant must be in fault.⁶ This, therefore, is the rule in actions upon contracts,—there must be a performance⁷ or readiness to perform,⁸ as the particular contract may require, by the plaintiff, and a breach by the defendant. The minuter explanations are for our remaining sub-titles.

II. *As to the Plaintiff.*

§ 1419. **Nature of Undertaking.**—To determine whether or not a plaintiff is in the right, so as to be entitled to take advantage of the defendant's wrong, we must look to the

¹ Ante, § 241.

² *Burkham v. Daniel*, 56 Ala. 604.

³ *Parker v. School District*, 5 Lea, 525; *Drayton v. Reid*, 5 Daly, 442; *Newman v. Reagan*, 65 Ga. 512; *Brink v. Fay*, 7 Daly, 562.

⁴ *Utley v. Burns*, 70 Ill. 162; *Hathorn v. Richmond*, 48 Vt. 557; *Ballou v. Prescott*, 64 Maine, 305.

⁵ *Waugh v. Shunk*, 8 Harris, Pa. 130; *Parker v. Platt*, 74 Ill. 430; *Eaton v. Woolly*, 28 Wis. 628; *Newman v. Reagan*, 63 Ga. 755; *Harris v. Rathbun*, 2 Abb. Ap. 326.

⁶ 1 Bishop Crim. Law, § 11; 2 Bishop Mar. & Div. § 75; *Smith v. Cedar Rapids Railroad*, 43 Iowa, 239; *Raw-*

son v. Clark, 70 Ill. 656; *Taylor v. Renn*, 79 Ill. 181; *Coulter v. Board of Education*, 63 N. Y. 365; *Buffkin v. Baird*, 73 N. C. 283. And see ante, § 489, 816, 835.

⁷ *Long v. Hartwell*, 5 Vroom, 116; *Allen v. Atkinson*, 21 Mich. 351; *Brown v. Fitch*, 4 Vroom, 418; *Pullman v. Corning*, 5 Selden, 93.

⁸ *Noble v. Edwardes*, 5 Ch. D. 378, 393; *Hapgood v. Shaw*, 105 Mass. 276; *Carpenter v. Holcomb*, 105 Mass. 280; *Bradford v. Williams*, Law Rep. 7 Ex. 259; *Smith v. Lewis*, 24 Conn. 624; *Seymour v. Bennet*, 14 Mass. 266, 268; *Darland v. Greenwood*, 1 McCrary, 337.

nature of the mutual undertaking, as defined by the interpreted contract. Thus, —

§ 1420. **Dependent, Separate Promises.** — If one of two parties is to do a thing, whereupon the other is to do something else, the former cannot sue the latter for non-performance until he has himself performed ;¹ as, for example, he cannot recover an agreed salary until he has fully discharged the duties in return for which it is awarded.² And one who, for a sum to be paid him, undertakes to find a purchaser for a farm, cannot enforce payment until he has found a person willing to buy it entire.³ Nor will it suffice that the thing which the plaintiff has done is as good as what he agreed ; it must be the particular thing.⁴ Further —

§ 1421. **As to which.** — If, where the performance has been imperfect or incomplete, the defendant has still derived a benefit therefrom, the plaintiff may, or not, according to the circumstances, maintain an action for the value of such benefit, on a promise which the law will create, as will be explained in the next chapter. So, also, as shown in a preceding chapter,⁵ there may be a waiver by the defendant, excusing the plaintiff from doing the thing in time or manner.⁶ Beyond this, there are cases, probably not quite reducible to a rule, — yet, in general, including all those in which there has been a substantial performance,⁷ accompanied

¹ *Cornell v. Cornell*, 96 N. Y. 108 ; *Shelden v. Dutcher*, 35 Mich. 10 ; *Belt v. Stetson*, 26 Minn. 411 ; *Bryant v. Sears*, 49 Iowa, 373 ; *McLaughlin v. Child*, 62 Ind. 412 ; *Lyndon Granite Co. v. Farrar*, 53 Vt. 585 ; *Branch v. Palmer*, 65 Ga. 210 ; *Gilbert v. Port*, 28 Ohio State, 276 ; *Ehlert v. Klenger*, 43 Mich. 61 ; *White v. Day*, 56 Iowa, 248 ; *Pratt v. Canton Cotton Co.* 51 Missis. 470 ; *Murphy v. St Louis*, 8 Misso. Ap. 483 ; *Jones v. United States*, 96 U. S. 24 ; *Vinton v. Baldwin*, 88 Ind. 104 ; *Taylor v. Jackson*, 5 Houst. 224 ; *Jewett v. Brown*, 71 Maine, 485 ; *Fay v. Guynon*, 131 Mass. 31 ; *Bugbee v. Haynes*, 43 Vt. 476 ; *Hopkins v. Sanford*, 38 Mich. 611 ; *Thoubboron v. Lewis*, 43 Mich.

635 ; *Skidmore v. Eikenberry*, 53 Iowa, 621.

² *Allegany v. Adams*, 43 Md. 349 ; *People v. Gardner*, 55 Cal. 304.

³ *Weber v. Clark*, 24 Minn. 354.

⁴ *Bixby v. Wilkinson*, 25 Minn. 481 ; *Fauble v. Davis*, 48 Iowa, 462 ; *Dauchey v. Drake*, 85 N. Y. 407.

⁵ Ante, § 789-807.

⁶ *Robinson v. Bullock*, 66 Ala. 548 ; *Levy v. Burgess*, 64 N. Y. 390 ; *Norton v. Browne*, 89 Ind. 333 ; *Dauchey v. Drake*, supra ; *Lawrence v. Miller*, 86 N. Y. 131 ; *Flannery v. Rohrmayer*, 46 Conn. 558 ; *Holton v. McPike*, 27 Kan. 286 ; *Bast v. Byrne*, 51 Wis. 531 ; *Benjamin v. Zell*, 4 Out. Pa. 33.

⁷ Ante, § 605 ; *Chandler v. The*

by good faith,¹—wherein, though the plaintiff is not absolutely free from fault or omission, the court will not turn him away; but, enforcing his rights on the one hand, will preserve the defendant's rights on the other, by permitting a recoupment, set-off, or cross action.² Yet the mere belief of a plaintiff that the things done constitute a performance, when they do not, will not avail him.³ The doctrine of this section cannot be fully extended to a—

§ 1422. **Condition Precedent.**—A condition precedent must be strictly complied with; and, where it has not been so by the plaintiff, he cannot successfully complain of the defendant's breach,⁴ unless the latter has waived it or done something else to excuse performance.⁵ What is here meant is the interpreted condition; as, if payment is to be made when a certain cause is decided in favor of the plaintiff, such condition is fulfilled by an agreement that the plaintiff shall have judgment for a specified sum.⁶

§ 1423. **Independent Promises.**—The foregoing doctrines do not apply to cases wherein, by the form or nature of the contract, the promise of the one party is independent of that of the other.⁷ He who is in default must then answer for it, though he has a claim upon the other under the same contract.⁸ Again,—

State, 38 Ark. 197; *Loren v. Hillhouse*, 40 Ohio State, 302; *Rees v. Smith*, 1 Ohio, 124; *Hovey v. Pitcher*, 13 Misso. 191; *Malbon v. Birney*, 11 Wis. 107.

¹ *Beach v. Mullin*, 5 Vroom, 343; *Wade v. Haycock*, 1 Casey, Pa. 382.

² *Eaton v. Woolly*, 28 Wis. 628; *Parker v. Platt*, 74 Ill. 430; *Kenworthy v. Stevens*, 132 Mass. 123; *Warren v. Stoddart*, 105 U. S. 224; *Reed v. Galaher*, 53 Ga. 456; *The State v. Blain*, 36 Ohio State, 429; *Supervisors v. Arrghi*, 51 Missis. 667; *Houston, &c. Railway v. Snelling*, 59 Texas, 116; *Van Buren v. Digges*, 11 How. U. S. 461; *Dunlap v. Hand*, 26 Missis. 460; *Noble v. James*, 2 Grant, Pa. 278; *Williams v. Schmidt*, 54 Ill. 205; *Garfield v. Huls*, 54 Ill. 427.

³ *Smyth v. Ward*, 46 Iowa, 339; *Devine v. Edwards*, 101 Ill. 138.

⁴ *Ante*, § 586; *Aller v. Pennell*, 51 Iowa, 537; *Drake v. Hill*, 53 Iowa, 37; *Worsley v. Wood*, 6 T. R. 710; *Snell v. Cheney*, 88 Ill. 258; *Claffin v. Commonwealth Ins. Co.* 110 U. S. 81; *Toombs v. Consolidated Poe Mining Co.* 15 Nev. 444; *Webb v. Smith*, 6 Colo. 365; *Fayetteville Bank v. Clark*, 9 Baxter, 589. And see *Piper v. Kingsbury*, 48 Vt. 480.

⁵ *Mains v. Haight*, 14 Barb. 76; *Livesey v. Omaha Hotel*, 5 Neb. 50; *Estabrook v. Omaha Hotel*, 5 Neb. 76; *Boehme v. Omaha Hotel*, 5 Neb. 80; *Stockwell v. Gidney*, 73 Maine, 84.

⁶ *Kittrell v. Hawkins*, 74 N. C. 412.

⁷ *Ante*, § 401.

⁸ *Pordage v. Cole*, 1 Saund. Wms.

§ 1424. **Defendant's Preventing.** — In the case of dependent promises, a plaintiff who has come short of fulfilment because the defendant prevented him, may maintain his action.¹

III. *As to the Defendant.*

§ 1425. **Inability or Refusal.** — A common breach is where one is unable or declines to go on with his contract;² or where, after the other has performed, he cannot or will not pay the agreed price.³ Again, —

§ 1426. **Disqualify Self.** — If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not arrived.⁴ Or, —

§ 1427. **Disqualified when Contract made.** — If, when he makes a contract, he is, unknown to the other party, disqualified to fulfil it, the breach is simultaneous with the promise, and he may be sued immediately.⁵ In like manner, —

§ 1428. **Wrongful Rescinding — Refusal.** — One exercising the power, already spoken of,⁶ to rescind his contract without right, — that is, declaring to the other party his intention not to abide by it, — commits thereby a breach whereon the other may bring an immediate suit, without demanding a perform-

ed. 319 l, and note; *Carpenter v. Cresswell*, 4 Bing. 409, 411; *McRaven v. Crisler*, 53 Missis. 542; *Lutz v. Thompson*, 87 N. C. 334; *Adrian v. Lane*, 13 S. C. 183; *Moggridge v. Jones*, 14 East, 486; *Campbell v. Jones*, 6 T. R. 570.

¹ Ante, § 1422; post, § 1431; *Hotham v. East India Co.* 1 Doug. 272; *Mackay v. Dick*, 6 App. Cas. 251; *Risley v. Smith*, 64 N. Y. 576.

² Ante, § 837-840; *Lyman v. Lyman*, 133 Mass. 414; *Thompson v. Laing*, 8 Bosw. 482; *Davis v. Crawford*, 2 Mill. 401.

³ *Shackelford v. Barrow*, 2 Bay, 91.

⁴ Ante, § 826; *Wolf v. Marsh*, 54 Cal. 228; *Lovelock v. Franklyn*, 8 Q. B.

371, 10 Jur. 246; *Short v. Stone*, 3 Dowl. & L. 580, 10 Jur. 245; *Caines v. Smith*, 15 M. & W. 189; *Boyle v. Guy-singer*, 12 Ind. 273; *Delamater v. Miller*, 1 Cow. 75; *Lovering v. Lovering*, 13 N. H. 513; *Webster v. Coffin*, 14 Mass. 196; *Cooper v. Mowry*, 16 Mass. 5, 7; *Bassett v. Bassett*, 55 Maine, 127; *Smith v. Jordan*, 13 Minn. 264; *Crist v. Armour*, 34 Barb. 378; *Branson v. Oregonian Railway*, 10 Oregon, 278; *Main's Case*, 5 Co. 20 b. See *McDonald v. Williams*, 1 Hilton, 365.

⁵ Post, § 1429; *Woods v. North*, 6 Humph. 309; *Harrington v. Wells*, 12 Vt. 505.

⁶ Ante, § 837-841.

ance which, by the terms of the contract, was to be in the future.¹ To illustrate,—

§ 1429. **Marriage Promise.**—After a mutual promise to marry, if it turns out that one of the parties was already under the disabilities of a prior marriage,²—or, if he marries afterward another person,³—or breaks off the engagement before the time for its fulfilment,⁴—the other may immediately sue for the breach of promise. Or,—

§ 1430. **Make Conveyance.**—The agreement being that one shall convey lands or goods to another, if the former parts with them, or if he destroys the goods, the latter may sue him without waiting for the contract time to elapse, and without demanding the conveyance.⁵

§ 1431. **Obstructing Performance.**—For the like reason, a party who prevents the other from performing the contract, or hinders him therein, violates it. And the doctrine, which is sound in some circumstances, is often laid down quite broadly, that the one who keeps the other from fulfilling must pay the same as though it were fulfilled.⁶ Also, if performance is a condition precedent, he who prevents it waives the condition.⁷ Even a mere hindrance may be a waiver as

¹ *Frost v. Knight*, Law Rep. 7 Ex. 111; *Holloway v. Griffith*, 32 Iowa, 409; *Bunge v. Koop*, 48 N. Y. 225; *Crabtree v. Messersmith*, 19 Iowa, 179; *Jewett v. Brooks*, 134 Mass. 505; *United States v. Behan*, 110 U. S. 338; *Sullings v. Goodyear Dental Vulc. Co.* 36 Mich. 313; *Mersey Steel, & Co. v. Naylor*, 9 App. Cas. 434, 442, 443; *Shaw v. Republic Life Ins. Co.* 69 N. Y. 286; *Hochster v. De La Tour*, 2 Ellis & B. 678. If, however, the disability is involuntary, it will not be deemed a breach until the time for performance arrives. *Heard v. Bowers*, 23 Pick. 455.

² *Blattmacher v. Saal*, 29 Barb. 22. If the disability is known to both parties, the promise is void, and no action will lie. *Haviland v. Halstead*, 34 N. Y. 643. For an explanation of this distinction, see ante, § 481, 482, 489. And see *Blossom v. Barrett*, 37 N. Y. 434.

³ *Short v. Stone*, 8 Q. B. 358; *King v. Kersey*, 2 Ind. 402; *Clements v. Moore*, 11 Ala. 35.

⁴ *Frost v. Knight*, Law Rep. 7 Ex. 111; *Holloway v. Griffith*, 32 Iowa, 409; *Burtis v. Thompson*, 42 N. Y. 246. See *Coil v. Wallace*, 4 Zab. 291.

⁵ *Newcomb v. Brackett*, 16 Mass. 161; *Heard v. Bowers*, 23 Pick. 455, 460; *Griffith v. Goodhand*, T. Jones, 191; *Hopkins v. Young*, 11 Mass. 302, 306.

⁶ *Majors v. Hickman*, 2 Bibb, 217; *Carrell v. Collins*, 2 Bibb, 429; *Marshall v. Craig*, 1 Bibb, 379. See *Blood v. Enos*, 12 Vt. 625; *Devlin v. Second Avenue Railroad*, 44 Barb. 81; *Wallman v. Society of Concord*, 45 N. Y. 485; *St. Louis v. McDonald*, 10 Misso. 609.

⁷ Ante, § 1424; *Dodge v. Rogers*, 9 Minn. 223; *Jones v. Walker*, 13 B.

to time.¹ And plainly one cannot maintain a suit against another for not doing what he put it out of the other's power to do.² But —

§ 1432. **Limits of Doctrine.**— This doctrine should not be carried to the extent of working injustice. It needs no argument to show, that, if one who has promised to pay for a thousand bushels of wheat on delivery refuses to accept it, he cannot be made to pay the entire agreed sum, and the other permitted to keep the wheat.³ Or, if one is to have ten thousand dollars for building a house on another's land, the latter, on ordering him off, cannot be compelled to pay all, with no benefit conferred.⁴ The true doctrine for such a case has, it is believed, been stated in a previous chapter.⁵

IV. *Further Questions.*

§ 1433. **Concurrent.**— Under a contract which, as interpreted, calls for concurrent acts by the parties, — for example, requires the one to convey land to the other who is simultaneously to pay for it, — neither can maintain a suit against the other until he has done his part, or offered to do it on the other's performing; and, in some circumstances, or by some opinions, performance by the other must also be demanded.⁶

Monr. 163; *Camp v. Barker*, 21 Vt. 469; *Williams v. United States Bank*, 2 Pet. 96, 102.

¹ *Ketchum v. Zeilsdorff*, 26 Wis. 514.

² *Stewart v. Keteltas*, 36 N. Y. 388; *McKee v. Miller*, 4 Blackf. 222; *Parker Vein Coal Co. v. O'Hern*, 8 Md. 197; *Gibson v. Dunnam*, 1 Hill, S. C. 289; 2 Chit. Con. 11th Am. ed. 1087. But a third person's interference will not thus avail the defendant. *Bowery Nat. Bank v. New York*, 63 N. Y. 336.

³ The measure of damages in this class of cases is ordinarily the difference between the contract price and the market value. *Cullen v. Bimm*, 37 Ohio State, 236; *Cockburn v. Ashland Lumber Co.* 54 Wis. 619. Under some facts, therefore, the damages will be but nominal. *Wire v. Foster*, 62 Iowa, 114.

⁴ See, and query, *Clendennen v. Paulsel*, 3 Misso. 230.

⁵ Ante, § 837-841.

⁶ *Fuller v. Hubbard*, 6 Cow. 13; *Ishmael v. Parker*, 13 Ill. 324; *Small v. Reeves*, 14 Ind. 163; *Fuller v. Williams*, 7 Cow. 53; *Kane v. Hood*, 13 Pick. 281; *Runkle v. Johnson*, 30 Ill. 328; *Stokes v. Burrell*, 3 Grant, Pa. 241; *Dana v. King*, 2 Pick. 155; *Brown v. Gammon*, 14 Maine, 276; *Howe v. Huntington*, 15 Maine, 350; *Hunt v. Livermore*, 5 Pick. 395; *Perry v. Wheeler*, 24 Vt. 286; *Savage Manuf. Co. v. Armstrong*, 19 Maine, 147; *Leaird v. Smith*, 44 N. Y. 618; *Mackay v. Dick*, 6 App. Cas. 251; *Price v. Sanders*, 39 Ark. 306; *Stockton Sav. &c. Soc. v. Hildreth*, 53 Cal. 721; *Hedge v. Gibson*, 58 Iowa, 656.

In reason, a tender of the deed, money, or other value; and keeping the tender good, should be deemed enough; unless, from the nature of the thing to be done by the other party, time is required, and then the needful time should be offered also.¹ Again, —

§ 1434. **Successive Steps.** — If the interpreted contract demands successive steps, now a step by the one party and then a step by the other, whenever on the one side all is done which is to precede performance on the other, the party of the other side breaks it if he simply neglects to take his step, though no demand on him is made; but, while anything, however slight, remains unperformed by the former party, there is no breach by the latter.² To illustrate, —

§ 1435. **Predetermining — (Election).** — We have seen that, under a contract in the alternative, the party who by its interpreted terms is to take the step at which the choice of ways presents itself, necessarily and of law elects by which one the fulfilment shall be.³ One of the consequences whereof is, that, if such party neglects to elect by fulfilling, the right of choice passes thereupon to the other party, who may sue for the breach of the alternative he prefers.⁴ Another consequence of the doctrine is its correlate; namely, if the contract, as interpreted, empowers one of the parties to elect, in any particular, how it shall be fulfilled, such party must take the first step by making the election; until which, there can be no breach by the other. Thus, —

§ 1436. **Pay in Specific Articles.** — On one's promise to pay a given sum to another in such specific things as the latter may choose, or in goods at whatever time and place the latter

¹ See *Gushee v. Eddy*, 11 Gray, 502, 503; *Cobb v. Hall*, 33 Vt. 233; *Biggers v. Pace*, 5 Ga. 171; *Hammond v. Gilmore*, 14 Conn. 479.

² *Adams v. New York*, 4 Duer, 295; *Helm v. Wilson*, 4 Misso. 41; *Burke v. Wells*, 50 Cal. 218; *Watson v. Walker*, 3 Fost. N. H. 471; *Brewer v. Tysor*, 3 Jones, N. C. 180; *Wagenblast v. McKean*, 2 Grant, Pa. 393; *Downer v. Frizzle*, 10 Vt. 541; *McCarren v. McNulty*, 7 Gray, 139; *Pratt v. Law*, 9

Cranch, 456; *Bersch v. Sander*, 37 Misso. 104; *Niblett v. Herring*, 4 Jones, N. C. 262; *Bishop v. Newton*, 20 Ill. 175; *Abbott v. Gatch*, 13 Md. 314; *Noble v. James*, 2 Grant, Pa. 278; *Hill v. Smith*, 32 Vt. 433; *Bollman v. Burt*, 61 Md. 415; *Reddick v. Gressman*, 49 Misso. 389.

³ Ante, § 785-787.

⁴ Ante, § 785; *McNitt v. Clark*, 7 Johns. 465; *Nesbitt v. Pearson*, 33 Ala. 668.

prefers, or at an indefinite time, the first step is necessarily to make and announce the election, by particularizing the articles, or the time or the place of their delivery. This devolves on the promisee; and, until he does it, the promisor has no occasion to make a tender, and is not suable.¹ These conditions attend most contracts in the form of promissory notes payable in specific articles; whence it has become a sort of general rule that a note of this kind does not become due in money, and the foundation of a suit, until there have been a demand and refusal.² But the note is sometimes drawn in terms leaving nothing for subsequent individualization, or otherwise so as not to be within this principle, and then an action without demand may be sustained on it, when the time of payment has elapsed, unless the defendant has duly tendered the articles.³ The adjudged cases on this question are not uniformly consistent with one another.⁴

§ 1437. **Pay Money** — ("On Demand"). — If, without qualification, one promises to pay money to another, either generally⁵

¹ *Baker v. Stoughton*, 1 Oregon, 227; *Corbitt v. Stonemetz*, 15 Wis. 170; *Newton v. Wales*, 3 Rob. N. Y. 453; *Hambel v. Tower*, 14 Iowa, 530; *Wear v. Jacksonville, &c. Railroad*, 24 Ill. 593; *Morey v. Enke*, 5 Minn. 392; *Posey v. Scales*, 55 Ind. 282. But see *Bixby v. Whitney*, 5 Greenl. 192.

² *Greenwood v. Curtis*, 6 Mass. 358, 364; *Smith v. Leavensworth*, 1 Root, 209; *Dean v. Woodbridge*, 1 Root, 191; *Johnson v. Baird*, 3 Blackf. 153; *Stevens v. Adams*, 45 Maine, 611; *Lobdell v. Hopkins*, 5 Cow. 516; *Dunn v. Marston*, 34 Maine, 379; *Chandler v. Windship*, 6 Mass. 310; *Wilmouth v. Patton*, 2 Bibb, 280; *Chambers v. Winn*, Pr. Dec. 2d ed. 166; *Gushee v. Eddy*, 11 Gray, 502. But see *Cobb v. Reed*, 2 Stew. 444.

³ *Bernard v. Bernard*, 1 Lev. 289; *Marshall v. Ferguson*, 23 Cal. 65; *Wheeler v. Garsia*, 5 Rob. N. Y. 280; *Stewart v. Morrow*, 1 Grant, Pa. 204; *Wiley v. Shoemaker*, 2 Greene, Iowa, 205; *Plowman v. Riddle*, 7 Ala. 775; *Miller v. McClain*, 10 Yerg. 245; *Vanhooser*

v. Logan, 3 Scam. 389; *Hardeman v. Cowan*, 10 Sm. & M. 486; *Deel v. Berry*, 21 Texas, 463; *Perry v. Smith*, 22 Vt. 301; *Fleming v. Potter*, 7 Watts, 380; *Orr v. Williams*, 5 Humph. 423; *Peck v. Hubbard*, 11 Vt. 612; *Chambers v. Harger*, 6 Harris, Pa. 15; *Nipp v. Diskey*, 81 Ind. 214; *Fredenburg v. Turner*, 37 Mich. 402.

⁴ See, in addition to the preceding cases, *Lahey v. Chadwick*, 66 Misso. 622; *Field v. Black*, 42 Vt. 517; *Phillips v. Allegheny Car Co.* 1 Norris, Pa. 368; *Stack v. Charlotte, &c. Railroad*, 10 S. C. 91; *Saylor v. United States*, 14 Ct. of Cl. 453; *Ragland v. Wood*, 71 Ala. 145, 150; *The State v. Mooney*, 65 Misso. 494, 496.

⁵ *Purdy v. Philips*, 1 Duer, 369; *Payne v. Mattox*, 1 Bibb, 164; *Slack v. Price*, 1 Bibb, 272; *Thompson v. Ketcham*, 8 Johns. 190; *Columbia Bank v. Hagner*, 1 Pet. 455; *Bailey v. Clay*, 4 Rand. 346; *Gibbs v. Southam*, 5 B. & Ad. 911; *Farquhar v. Morris*, 7 T. R. 124; *Kendal v. Talbot*, 1 A. K. Mar. 321.

or "on demand,"¹ it becomes due simultaneously with the promise,—if, to pay on a specified future day, it is due on such day,—and, in either case, there being nothing for the promisee to do, the promisor must find him² if within the State,³ and tender him the money; in default whereof a suit may be maintained against him, and no demand in fact is necessary.⁴

§ 1438. **Payable Sunday.**—The rule is familiar that a bill or note, having days of grace, and falling due, grace included, on Sunday, is payable on Saturday.⁵ But in ordinary contracts, where the element of grace is not recognized, the rule is by most opinions reversed; Sunday is not counted, and the performance or breach takes place on Monday,⁶ though some hold Saturday to be the day.⁷ There are analogies for rejecting Sunday from the computation of time, it being a day on which business is forbidden,⁸ following which we may well require performance to be postponed till Monday; besides, where the day is in terms fixed by the parties, how can a court change their words, and make it earlier than they have done?⁹

¹ Ante, § 1354; 2 Saund. Wms. ed. 63 d, note; *Omohundro v. Omohundro*, 21 Grat. 626; *Capp v. Lancaster*, Cro. Eliz. 548; *Cotton v. Reavill*, 2 Bibb, 99; *Pullen v. Chase*, 4 Pike, 210; *Thomson v. Butler*, Cro. Eliz. 721; *Kingsbury v. Butler*, 4 Vt. 458; *Brett v. Ming*, 1 Fla. 447; *Ross v. Lafayette, &c. Railroad*, 6 Ind. 297. The distinction in the books is, that, "where a mere duty is promised to be paid upon request, there needs no actual request; but, where a collateral sum is promised to be paid upon request, there must be an actual request." *Birks v. Trippet*, 1 Saund. Wms. ed. 32, 33 b. And see *Blackwell v. Fosters*, 1 Met. Ky. 88; *Massey v. Sladen*, Law Rep. 4 Ex. 13; *Moore v. Shelley*, 8 App. Cas. 285.

² *Kidwelly v. Brand*, 1 Plow. 69, 71; *Sage v. Ranney*, 2 Wend. 532; *Sanders v. Norton*, 4 T. B. Monr. 464; *Pomeroy v. Ainsworth*, 22 Barb. 118.

³ Co. Lit. 210 b; 2 Chit. Con. 11th

Am. ed. 1069; *Littell v. Nichols*, Hardin, 2d ed. 71; *Gill v. Bradley*, 21 Minn. 15; *Smith v. Walton*, 5 Houst. 141.

⁴ *Langston v. South Carolina Railroad*, 2 S. C. 248; *O'Connor v. Dingley*, 26 Cal. 11; *McDonald v. Gray*, 11 Iowa, 508; *Wheeler v. Garsia*, 5 Rob. N. Y. 280. And see *Trinity Church v. Higgins*, 48 N. Y. 532.

⁵ *Farnum v. Fowle*, 12 Mass. 89; *Barlow v. Planters Bank*, 7 How. Missis. 129; *Sanders v. Ochiltree*, 5 Port. 73; *Sheppard v. Spates*, 4 Md. 400. See, under the New Jersey statute, *Hagerty v. Engle*, 14 Vroom, 299.

⁶ *Salter v. Burt*, 20 Wend. 205; *Stryker v. Vanderbilt*, 3 Dutcher, 68; *Stebbins v. Leowolf*, 3 Cush. 137; *Carothers v. Wheeler*, 1 Oregon, 194.

⁷ *Kilgour v. Miles*, 6 Gill & J. 268.

⁸ *Bishop Written Laws*, § 110 c.

⁹ **Limitations.**—Consistently with this view it is held that, where the law fixes the time within which an act shall

§ 1439. **When Suit.** — A suit at law is maintainable only after the cause of action is fully consummated.¹ And this is determined by reckoning the day of performance entire, rejecting fractions of the day;² so that the party who is to pay or otherwise fulfil has the whole day for it, and a suit for the breach cannot be instituted till the next day.³ Negotiable paper furnishes a partial exception to this rule; as to which, if payment thereon is demanded at a reasonable hour on the last day of grace, and refused, an action may then be commenced; though, without such demand, it cannot be.⁴ This exception does not extend to money promised on any other sort of contract.⁵

§ 1440. *The Doctrine of this Chapter restated.*

A contract fully executed on one side is violated if the party on the other simply fails to do what it requires of him. But where there are mutual and dependent promises, so long as the one party leaves undone anything, even though minute, which must precede the doing by the other, the latter's non-doing cannot constitute a breach. Each, to put the other in default, must himself take every step which antedates the one the non-taking whereof by the other is the matter of his complaint. Or, if the steps are to be simultaneous, neither can sue the other without first tendering his step, though he need not actually take it during the other's refusal. One who, before the time for performance, finds himself disabled through poverty, has not thereby violated his contract; this sort of breach can occur only on the day.

be done, and it expires on Sunday, a doing on Monday will be too late. *Hailey v. Young*, 134 Mass. 364; *Allen v. Elliott*, 67 Ala. 432.

¹ Ante, § 1354; *Wadley v. Jones*, 55 Ga. 329; *Nickerson v. Babcock*, 29 Ill. 497; *Blevins v. Alexander*, 4 Sneed, Tenn. 583; *Moore v. Dickerson*, 44 Ala. 485.

² Ante, § 1340, 1341.

³ *Estes v. Tower*, 102 Mass. 65; *Da-*

vis v. Eppinger, 18 Cal. 378; *Thomas v. Shoemaker*, 6 Watts & S. 179; *Webb v. Fairmaner*, 3 M. & W. 473.

⁴ *Greeley v. Thurston*, 4 Greenl. 479; *Estes v. Tower*, supra; *Ammidown v. Woodman*, 31 Maine, 580. But see, as to New York, *Continental Nat. Bank v. Townsend*, 87 N. Y. 8, 10; and *Texas, Watkins v. Willis*, 58 Texas, 521.

⁵ *Harris v. Blen*, 16 Maine, 175.

But, if one agrees to do what he has not the legal capacity for, and the other is not a partaker with him in the attempt to violate the law, — or if, having then the capacity, he afterward does what incapacitates himself, — or, if he puts the thing contracted about beyond his control, so that his inability to perform on the appointed day is now demonstrated, — or, if he signifies to the other party that he will not fulfil, — in any one of these cases, a breach is committed, and an action may be maintained by the other party, though the time set down in the contract for performance has not arrived. The whole of the designated day is allowed for the doing; and, except on a bill or note after a demand, the suit cannot be brought until the next day.

CHAPTER LVI.

THE CONTRACT WHICH THE LAW CREATES AFTER A BREACH,
IMPERFECT PERFORMANCE, OR ABANDONMENT.

§ 1441. *Already — Here.* — The subject of this chapter has already been largely under review, at different places, in its relations to the varying topics elucidated in the foregoing pages. Most of these places are referred to in a note.¹ The author will here present a condensed view of it; and, avoiding repetitions, rely upon the reader's consulting, in connection with this chapter, the other places.

§ 1442. *On what Principles.* — If never, after a contract has been broken, imperfectly performed, or abandoned, any legal adjustment of the rights of the parties were permitted except under the contract itself, as explained in the last chapter, great injustice would not unfrequently follow. One whose property or services had gone, either at the making of the contract or afterward, to enrich another and impoverish himself, might then be without remedy, however small the blame on his side or the merit on the other. To avoid which, the law in proper circumstances creates a contract,² to supplement or stand in the stead of the one which the parties had made. And therein it proceeds on the principle, that he who has conferred upon another a benefit not meant to be gratuitous is entitled to be paid therefor,³ except where some other principle interposes with superior force. There are, on this head, some difficulties and judicial differences, — all, or most,

¹ Ante, § 93, 188, 217, 226, 227, 232, 233, 235-237, 286, 301, 682, 818, 834, 837-840, 940, 968-970, 1091-1110, 1219, 1221-1225, 1236, 1283, 1346, 1421.

² Ante, § 181 et seq.

³ Consult the places cited to the last section.

upon the question whether, under given facts, the rule or some exception to it shall prevail. Moreover,—

§ 1443. **Nature of Authorities — (Law's Growth).** — In a large proportion of those reported cases wherein a suit on the express contract has failed, the question whether or not there is still a remedy on one which the law created, is not adverted to; and, pretty plainly, often a party entitled to the latter remedy abandons his cause in a needless despair. Besides, if, as is commonly said, the law grows under judicial culture,¹ that of the present topic has had its less and more mature states, and even yet it remains unduly green and its fruitage imperfect; so that what would not have been possible to litigants at an earlier period of its growth may be realized now, and still more may be within their grasp not many years hence. The law of the subject, therefore, can be but imperfectly —

§ 1444. **Defined.** — Whenever a contract has been receded from, performed so imperfectly that a suit on it cannot be maintained, or broken beyond repair, if there is in the hands of one of the parties any value which was transmitted to him from the other at its inception or in the course of any doing under it, over and above what he may be entitled to retain because of the other's fault relating thereto, he should return it to the other, failing which the other may recover it of him;² unless the suit for its recovery discloses a wrong in the plaintiff in the matter complained of — for example, in wilfully and without cause abandoning the contract — to a degree precluding him from a standing in court,³ or unless

¹ Ante, § 6, 7, 10, 1123–1125, 1132.

² Places referred to ante, § 1441; *Ladue v. Seymour*, 24 Wend. 60; *Dermott v. Jones*, 23 How. U. S. 220; *Dermott v. Jones*, 2 Wal. 1; *Merrill v. Ithaca, &c. Railroad*, 16 Wend. 586; *Hollinsead v. Mactier*, 13 Wend. 275; *Whipple v. Dow*, 2 Mass. 415; *Stewart v. Craig*, 3 Greene, Iowa, 505; *Arthur v. Saunders*, 9 Port. 626; *Thompson v. Purcell*, 10 Allen, 426; *Hayward v. Leonard*, 7 Pick. 181; *Bassett v. Sanborn*, 9 Cush. 58; *Thomas v. Ellis*, 4

Ala. 108; *Pratt v. Law*, 9 Cranch, 456; *Hall v. Cannon*, 4 Harring. Del. 360; *Lee v. Ashbrook*, 14 Misso. 378; *Draper v. Randolph*, 4 Harring. Del. 454; *Lo-max v. Bailey*, 7 Blackf. 599; *Allen v. Wills*, 4 La. An. 97; *Hargrave v. Conroy*, 4 C. E. Green, 281; *Preston v. Finney*, 2 Watts & S. 53; *Wade v. Haycock*, 1 Casey, Pa. 382; *Tunno v. Robert*, 16 Fla. 738.

³ Ante, § 835; 2 Bishop Mar. & Div. § 75; *Dermott v. Jones*, 2 Wal. 1; *Niblett v. Herring*, 4 Jones, N. C.

prohibited by reason of the original contract having been unlawful¹ or fraudulent,² or unless the bestowal of the beneficial thing was against the will of the recipient,³ and its return is impracticable,⁴ or unless some other positive rule of law or legal procedure forbids.

§ 1445. **As to which** — (Intent in Imperfect Performance). — By consulting our previous elucidations,⁵ the practitioner will see that there are on this question, and particularly as to the nature and extent of the wrong in the plaintiff which will preclude an action for benefits conferred in departure from the terms of the contract,⁶ judicial differences rendering imperative a vigilant looking into the decisions in his own State.⁷ The author submits that, in natural equity, and especially in juridical reason,⁸ if, of mere perverseness, and from no real or supposed necessity, a party violates or abandons his contract after having gone part way in conferring benefits on the other party, he confirms to the other what has thus been transmitted, and he can maintain no action therefor; but, if his short-coming was induced by an honest mistake of facts, or if he thought he was performing while he was not, or if he acted through ignorance, or poverty, or other force with which he could not contend, or through inadvertence short of wilful wrong, he may have back what the other party, after first being fully indemnified for the partial failure to perform, has gained over and above what would have been his gains from an exact and full doing. To

262; *Dula v. Cowles*, 2 Jones, N. C. 454; *Martin v. Schoenberger*, 8 Watts & S. 367; *Lewis v. Esther*, 2 Cranch C. C. 423; *Bayard v. McLane*, 3 Harring. Del. 139; *Brown v. Kimball*, 12 Vt. 617; *Malbon v. Birney*, 11 Wis. 107.

¹ Ante, § 471, 472, 476-478, 487, 627, 629.

² Ante, § 683.

³ Ante, § 211; *Mulligan v. Kenny*, 34 La. An. 50.

⁴ Ante, § 940.

⁵ Cited ante, § 1441.

⁶ Ante, § 835.

⁷ Consult, for example, *Smith v. Brady*, 17 N. Y. 173.

⁸ Consult, for example, analogies derivable from ante, § 188, 481-483, 489, 583; *Woolley v. Staley*, 39 Ohio State, 354; *Brewster v. Burnett*, 125 Mass. 68; *Lane v. Hogan*, 5 Yerg. 290; *Mayer v. New York*, 63 N. Y. 455, 457; *Devine v. Edwards*, 87 Ill. 177; *Bishop v. Brown*, 51 Vt. 330. Money which in equity and good conscience belongs to one may be recovered of another holding it, on the ground of a promise created by the law. *Bahnsen v. Clemmons*, 79 N. C. 556; *Harper v. Claxton*, 62 Ala. 46; *Wiseman v. Lyman*, 7 Mass. 286, 288; *Barnes v. Johnson*, 84 Ill. 95.

hold otherwise would be to deprive an unfortunate or weak man of what common justice and the ordinary justice of the law pronounce to be his. The right grows, not out of the express contract, but out of circumstances not in the contemplation of the parties when it was made.¹

§ 1446. *In Conclusion.* — These expositions might be carried to great length, but they would involve so much of partial or full repetitions of what has gone before that it is deemed best they should here close.

§ 1447. *The Doctrine of this Chapter restated.*

One who has conferred on another a benefit through a partial or imperfect performance of a contract, which is abandoned, may ordinarily maintain an action therefor, founded, not on the contract, but on a promise which the law creates. Yet various circumstances, not necessary to be here repeated, will, each in its appropriate case, defeat this right.

¹ In matter of authority, on one side and on the other, consult cases cited ante, § 1444; also *Bush v. Jones*, 2 Tenn. Ch. 190; *Wolf v. Gerr*, 43 Iowa, 339; *Flanders v. Putney*, 58 N. H. 358; *Bozarth v. Dudley*, 15 Vroom, 304; *Parker v. Steed*, 1 Lea, 206; *Goldsmith v. Hand*, 26 Ohio State, 101; *Levy v. Schwartz*, 34 La. An. 209; *Lawson v. Hogan*, 93 N. Y. 39; *Ray v. Haines*, 52 Ill. 485; *Meredith v. Crawford*, 34 Ind. 399; *Gaffney v. Hayden*, 110 Mass. 137; *Krom v. Levy*, 6 Thomp. & C. 253, 4 Hun, 79; *Roberts v. Wilkinson*, 34 Mich. 129; *Boyle v. Parker*, 46 Vt. 343; *Andrews v. Portland*, 35 Maine, 475; *Cardell v. Bridge*, 9 Allen, 355; *Clayton v. Blake*, 4 Ire. 497; *Steeple v. Newton*, 7 Oregon, 110; *Powers v. Wilson*, 47 Iowa, 666; *Parcell v. McComber*, 11 Neb. 209; *Bersch v. Sander*, 37 Misso. 104.

CHAPTER LVII.

THE PROVISIONS FOR LIQUIDATED DAMAGES AND FOR A
PENALTY.

§ 1448. Introduction.

1449-1454. Liquidated Damages.

1455-1460. Penalty.

1461. Doctrine of Chapter restated.

§ 1448. **How Chapter divided.** — We shall consider, I. The Provision for Liquidated Damages ; II. The Provision for a Penalty.

I. The Provision for Liquidated Damages ; that is, specifying what shall be paid upon a Violation.

§ 1449. **Defined.** — Liquidated damages are an ascertained and certain sum¹ stipulated in a contract to be paid by a party, should he violate it, in recompense to the other.²

§ 1450. **Enforceable or not.** — Such stipulation, if not inconsistent with the main agreement, or contrary to the law or its policy, or vitiated by fraud or the like, will be enforced by the courts ;³ otherwise, not.⁴ Still, —

§ 1451. **Not favored.** — Since natural equity is best satisfied

¹ Clark v. Dutton, 69 Ill. 521.

² See 2 Story Eq. § 1318.

³ Lea v. Whitaker, Law Rep. 8 C. P. 70 ; Carter v. Corley, 23 Ala. 612 ; Beale v. Hayes, 5 Sandf. 640 ; Cotheal v. Talmage, 5 Selden, 551 ; Hinton v. Sparkes, Law Rep. 3 C. P. 161 ; Crisdee v. Bolton, 3 Car. & P. 240 ; Hardee v. Howard, 33 Ga. 533.

⁴ Fitzpatrick v. Cottingham, 14 Wis. 219 ; Sutton v. Howard, 33 Ga. 536 ; Brown v. Maulsby, 17 Ind. 10 ; Sessions v. Richmond, 1 R. I. 298 ; Wambaugh v. Bimer, 25 Ind. 368 ; Gower v. Carter, 3 Iowa, 244 ; Bright v. Rowland, 3 How. Missis. 398.

by the payment of actual damages and no more, interpretation leans against holding a sum in a contract to be liquidated damages; accepting this conclusion only when plainly the parties so intend.¹ Thus, —

§ 1452. **Liquidated or Penalty.** — As between damages liquidated and a penalty, the inclination is always toward the latter; because so the payment will be made commensurate with the injury,² — a result which the parties may well be presumed to have intended, rather than the other. And not unfrequently, observed Keating, J., they plainly “could not have meant what they have apparently said;” as, “where a number of things are stipulated to be done, it has been held that the parties could not have meant that a large sum should be payable as liquidated damages for a failure to perform one or more of them.” In which case the court, giving effect to their real purpose, will hold the sum to be only a penalty.³ Though the very words of bargain are “liquidated damages,” they will yield in the construction to the true intent as appearing from the whole instrument;⁴ being made, in the proper case, to signify penalty;⁵ and, on the other hand, the word “penalty” is sometimes, on a view of the combined stipulations, rendered liquidated damages.⁶ In some connections, the word “damages” alone will denote such as are liquidated;⁷ so will “fixed and settled dam-

¹ *Shute v. Taylor*, 5 Met. 61, 67; *Cheddick v. Marsh*, 1 Zab. 463; *Baird v. Tolliver*, 6 Humph. 186; *Hahn v. Horstman*, 12 Bush, 249.

² *Wallis v. Carpenter*, 13 Allen, 19, 25; *The State v. Dodd*, 16 Vroom, 525; *Davis v. United States*, 17 Ct. of Cl. 201. And see *Fitzpatrick v. Cottingham*, 14 Wis. 219.

³ *Lea v. Whitaker*, Law Rep. 8 C. P. 70, 74; *Chase v. Allen*, 13 Gray, 42; *Gowen v. Gerrish*, 15 Maine, 273; *Higginson v. Weld*, 14 Gray, 165; *Watt v. Sheppard*, 2 Ala. 425; *Berry v. Wisdom*, 3 Ohio State, 241; *Carpenter v. Lockhart*, 1 Ind. 434; *Thoroughgood v. Walker*, 2 Jones, N. C. 15.

⁴ *Ante*, § 382-384, 400, 404; *Math-*

ews v. Sharp, 3 Out. Pa. 560; *Houghton v. Pattee*, 58 N. H. 326; *Williams v. Vance*, 9 S. C. 344; *Jones v. Binford*, 74 Maine, 439; *Smith v. Wedgwood*, 74 Maine, 457.

⁵ *Magee v. Lavell*, Law Rep. 9 C. P. 107; *Davis v. Freeman*, 10 Mich. 188; *Moore v. Platte*, 8 Misso. 467; *Hahn v. Horstman*, 12 Bush, 249.

⁶ *Duffy v. Shockey*, 11 Ind. 70; *Watt v. Sheppard*, 2 Ala. 425. And see *Chamberlain v. Bagley*, 11 N. H. 234; *Jackson v. Baker*, 2 Edw. Ch. 471.

⁷ *Pennsylvania Railroad v. Reichert*, 58 Md. 261; *McCormick v. Mitchell*, 57 Ind. 248.

ages;"¹ also, "stipulated damages" may mean the same.² Nor is any one of these words indispensable to either interpretation; but further specifications seem not to be required.³

§ 1453. **Equity** — will not relieve one from the legal liability, under his contract, to pay liquidated damages;⁴ "provided always," says Story, "the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature or extent of the injury."⁵ Moreover, —

§ 1454. **Specific Performance**, — when within the equity jurisdiction, will be enforced without reference to these collateral stipulations; it being immaterial, on this issue, whether the contract provides for a penalty, for liquidated damages, or for neither.⁶

II. *The Provision for a Penalty.*

§ 1455. **Defined.** — A penalty in a contract is a sum which, by its terms, is to be forfeited by a party, should he break it, to the other.

§ 1456. **By the Old Common Law**, — as administered in the common-law courts, a contract with a penalty could be sued in an action of debt; and, if in any one of its stipulations a breach was shown, judgment would be rendered for the entire sum.⁷ But, —

§ 1457. **Relief in Equity.** — By applying to an equity tribu-

¹ *Ivinson v. Althrop*, 1 Wy. 71.

² *Yetter v. Hudson*, 57 Texas, 604.

³ See further, for example, *Couch v. Couch*, 65 Ga. 748; *Scofield v. Tompkins*, 95 Ill. 190; *Savannah, &c. Railroad v. Callahan*, 56 Ga. 331; *Hooper v. Savannah, &c. Railroad*, 69 Ala. 529; *Nevada v. Hicks*, 38 Ark. 557; *Lyman v. Babcock*, 40 Wis. 503; *Dullaghan v. Fitch*, 42 Wis. 679; *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400; *Wallis v. Smith*, 21 Ch. D. 243.

⁴ *Westerman v. Means*, 2 Jones, Pa. 97; *Skinner v. White*, 17 Johns. 357, 369.

⁵ 2 Story Eq. § 1318.

⁶ 1 Story Eq. § 715, 751; *Hull v. Sturdivant*, 46 Maine, 34; *Plunkett v. Methodist Episc. Soc.* 3 Cush. 561, 566; *Ensign v. Kellogg*, 4 Pick. 1; *Fisher v. Shaw*, 42 Maine, 32.

⁷ *Gainsford v. Griffith*, 1 Saund. 51 and notes; *Coates v. Hewit*, 1 Wils. 80; *Thompson v. Hunt*, 3 Lev. 368; *Shaw v. Worcester*, 6 Bing. 385, 389. And see the statute of 8 & 9 Will. 3, c. 11, § 8, which provides equally for sealed and simple contracts, showing that, in the opinion of Parliament, there was before no distinction.

nal, the party in default might have the penalty set aside, on paying the money due, or otherwise fulfilling the contract. Whereupon, —

§ 1458. **English Legislation — American.** — For shortening the processes of justice, in 1697, the English statute of 8 & 9 Will. 3, c. 11, § 8, provided, that, on the recovery of judgment for a penal sum in any court of record, inquiry should be made by a jury as to the amount of damages suffered from breaches which had already transpired, on payment whereof the judgment should simply remain a security against further breaches. And, on there being such, the actual damage should, on *scire facias*, be in like manner ascertained.² Then, in 1705, it was enacted by 4 Anne, c. 16, § 13, that, upon an action on a bond with a penalty for the payment of money, if “the defendant shall bring into the court where the action shall be depending all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond.” The date of these statutes is subsequent to the earliest settlements in this country;³ still, being highly remedial and beneficial, they were accepted as common law in Maryland⁴ and Pennsylvania;⁵ and, it is believed, in nearly⁶ all of our other States. And there has been more or less American legislation to the like effect.⁷

¹ 2 Story Eq. § 1313, 1314; Peachy v. Somerset, 1 Stra. 447, 453; Skinner v. White, 17 Johns. 357; Thomson v. Harcourt, 1 Bro. P. C. 193.

² Such is the substance of a verbose provision. And see further as to it, the notes to Gainsford v. Griffith, 1 Saund. Wms. ed. 51, 57, et seq.

³ Bishop First Book, § 56.

⁴ Kilty Rep. Stats. 244, 246.

⁵ Report of Judges, 3 Binn. 595, 599, 625.

⁶ Not in Massachusetts, Sevey v. Blacklin, 2 Mass. 541; or Maine, Bailey v. Rogers, 1 Greenl. 186, 190; because of early colonial legislation super-

seding these English provisions. The Massachusetts court, speaking of another section of this statute of Anne, observes, that “this statute has always been practised upon here.” Bond v. Cutler, 10 Mass. 419, 421.

⁷ See, and as to the form of the judgment, Campbell v. Pope, Hemp. 271; Garnett v. Yoe, 17 Ala. 74; Toles v. Cole, 11 Ill. 562; Stose v. People, 25 Ill. 600; Eggleston v. Buck, 31 Ill. 254; Wales v. Bogue, 31 Ill. 464; Cameron v. Boyle, 2 Greene, Iowa, 154; Whitney v. Slayton, 40 Maine, 224; Rubon v. Stephan, 25 Missis. 253; Fontaine v. Aresta, 2 McLean, 127; Hoy v. Hoy, 44

§ 1459. **Damages above Penalty.** — Plainly in reason, and, at least, by a part of the decisions, in a suit for the penalty itself, nothing can be recovered in excess of it and the added costs.¹ And, where the instrument in litigation contains only a condition with a penalty to give it effect, there is no remedy besides this.² But if there are covenants secured by a penalty, the injured party has his election, either to proceed on such covenants, and to recover for the breach of them whatever damages he has suffered, which may be more or less than the penalty, or to proceed for the penalty; and the adoption of the one course excludes the other.³ There may be other distinctions of less importance; and, on the whole question, the cases seem not to be quite harmonious.⁴

§ 1460. **More Conditions than One.** — The penalty is forfeited by a breach of any one of several conditions, if such there are, on which it depends.⁵ Thus, on a bond to pay money by instalments, a lapse as to any one of them gives the right of action.⁶

§ 1461. *The Doctrine of this Chapter restated.*

To the immediate stipulations in an agreement it is sometimes added, that, if it is broken, the delinquent party shall pay to the other a sum named, in exact and final satisfaction for the damages; which, therefore, are called liquidated damages. This sort of arrangement, not for most cases quite

Ill. 469; *Blakemore v. Wood*, 3 Sneed, Tenn. 470; *Cairnes v. Knight*, 17 Ohio State, 68; *Trice v. Turrentine*, 13 Ire. 212; *Walcott v. Harris*, 1 R. I. 404; *Warren v. Gordon*, 10 Wis. 499.

¹ *Branscombe v. Scarbrough*, 6 Q. B. 13, 8 Jur. 688; *In re Wilson*, 11 Stew. Ch. 205; *Armstrong v. The State*, 7 Blackf. 81. See *Lonsdale v. Church*, 2 T. R. 388.

² *Stearns v. Barrett*, 1 Pick. 443, 450.

³ *Ante*, § 784; *Lowe v. Peers*, 4 Bur. 2225, 2228; *Perkins v. Lyman*, 11 Mass. 76, 83; *Stearns v. Barrett*, *supra*; *Mc-*

Laughlin v. Hutchins, 3 Ark. 207; *Martin v. Taylor*, 1 Wash. C. C. 1.

⁴ *Lyon v. Clark*, 4 Selden, 148; *Arnold v. United States*, 9 Cranch, 104; *Mower v. Kip*, 6 Paige, 88; *Sweem v. Steele*, 5 Iowa, 352, 10 Iowa, 374, 376; *Farrar v. Christy*, 24 Misso. 453; *Carter v. Thorn*, 18 B. Monr. 613; *Baker v. Morris*, 10 Leigh, 284; *Westbrook v. Moore*, 59 Ga. 204.

⁵ *Mosfen v. Touchet*, 2 W. Bl. 706.

⁶ *Coates v. Hewit*, 1 Wils. 80; *Judd v. Evans*, 6 T. R. 399; *Talbot v. Hodson*, 7 Taunt. 251.

equitable, yet sometimes judicious, is not much favored by the courts; still, where it is clearly meant by the parties, they will give it effect, unless for some reason special to the case it is contrary to the ordinary justice of the law. On the other hand, a penalty is never legally objectionable; because it only creates a fund out of which the actual damages, and no more, will be paid. Practically, this form of contracting is not often of special advantage to the parties, but there are cases in which it may be wisely chosen,—a question mostly depending on conveniences of the judicial procedure should the bargain be broken.

THE DOCTRINE OF THIS VOLUME RESTATED.

§ 1462. THERE is no legal subject which better than the present one illustrates that system of laws whereby, under varying modifications in different localities, nearly the entire English-speaking people of the world are governed. How it compares with other systems it is not proposed here to inquire.

§ 1463. It is a web woven from a warp of natural right and justice, by passing through it, from time to time and thread by thread, the limiting and compacting woof of technical rule. In other words, it is natural law, artificially modified and defined. In still other words, it is the image of justice which the governing power has hewn and shaped from the rock of original truth. Law, as a pure human creation, does not exist among us; on the other hand, mere abstract ethics do not constitute law. It is God's ethics wrought by man into jurisprudence. Thus, —

§ 1464. Contracting, which involves the making of promises from one to another, is as essential to the existence of man in communities as the air he breathes. There can be no social condition without it. And abstract justice, the rule of ethics, or whatever else we call natural duty in such a case, commands that he who promises shall perform. This is warp, or natural law. But, in the multitude of human transactions, there is abundant occasion for the interweaving with it of a woof of technical rule. Shall the courts enforce every promise which is binding in ethics? The jurisprudence of the common law has, by its technical rules, — by its woof, — answered, no. It requires a consideration or a seal. Also statutes have, for various particular sorts of promise, made

writing essential. But natural ethics disregard the limitations of a consideration, of the seal, and of writing. These are parcel of the woof of technical rule. Again, —

§ 1465. By the law of nature, every man is entitled to manage his own affairs, and he is not compellable to have even a benefit thrust upon him against his will. Out of this doctrine proceeds the familiar one in the law of contracts, that the parties, in order to be bound, must simultaneously assent each to exactly the same thing as the other. This is pure natural law. Viewed as warp, has it also a woof? It is matter often adjudicated upon by the courts, they have defined the doctrine, and given to it the same sort of exactitude as to the technical rules. It is difficult to say that herein they have changed the natural law; the more precise expression is, that they have defined it. We may deem such defining to be, in a certain sense, woof; but it is of the same material as the original warp. And thus we see that the woven web of the law which is enforced by the courts is, at places, identical in its nature with natural law; and that the human jurisprudence simply adds to it the outward sanction.

§ 1466. There can be no mutual consent without mutual capacity. Yet natural law pronounces that a person without capacity is still entitled to live. And often the arrangements of society furnish the incapable person with no means of subsistence except through contract. Here we have a conflict in natural law. And thus we learn that, in all law, whether natural or cultivated, the principles will at places antagonize one another; and then either the one must fully give way to the other, or the two must, through a sort of compromise, work out a result different from what either would alone. For the present dilemma, and for various others of a similar sort, our jurisprudence has devised what is termed a legal fiction, or fiction of the law, in exception to the general rule that there can be a contract only when the parties mutually and simultaneously assent to the same thing. By this fiction, the law, in circumstances where necessity or justice requires, creates, as the expression commonly is in the present volume, or presumes, as by many writers the idea is with less pre-

cision enunciated, a contract ; in other and still less accurate words, the law authorizes an insane person or an infant to bind himself by contract for necessities, when not otherwise supplied. By which artificial woof, our cultivated jurisprudence makes strong and serviceable the warp of the natural law, at a place of itself weak and inadequate.

§ 1467. One of the greatest difficulties connected with the practical working of the law of contracts is to determine the consequence where two or a dozen principles, each indicating its own separate conclusion, present themselves, apparently governing a particular question. Which one shall give way? Or shall they operate together, leading to a special result different from what any one alone would produce? In the elucidations of this volume, the author has kept this question constantly in mind, and has indicated the conclusion wherever possible. For example, he has shown that, as between the Statute of Frauds, which requires certain contracts to be in writing, and the legal fiction which creates certain contracts, the written rule gives way to the unwritten fiction ; and the law as readily creates a contract within as without the Statute of Frauds. In like manner, while real estate can be voluntarily conveyed only by a writing sealed, the law's estoppel may pass a title without even a word in writing. To retrace here this sort of illustration through the entire volume would involve too much repetition.

§ 1468. It is not possible that there should be any complete laying down of rules, whereby to determine the precedence of the principles where they thus come into conflict. Yet practically this matter does not greatly abound in difficulties, when approached by one who by reading has become familiar with the general principles of the law, and their combined workings. On the other hand, to one accustomed to look at the law only as a conglomeration of detached points, — whose studies are limited to digests, and to books called treatises and commentaries while in fact only digests, or to such as enunciate legal doctrine inaccurately or in unharmonized fragments, — these difficulties are very great, sometimes insurmountable.

§ 1469. Legal doctrine does not consist alone of abstract rules, but the principles for applying such rules are as important a part of it as the other, and more difficult of acquisition. And more difficult still is the calling of the rules to mind in connection with the facts of a case under investigation. The conflicts of judicial opinion, and the mistakes in decisions, rendering the law inharmonious, obscure, or unjust, come more from counsel and judges overlooking legal principles which, if suggested, all would accept as true, than from any, perhaps every, other source.

§ 1470. Every student and every practising lawyer should, first and most essential of all, cultivate the faculty for calling to mind the governing principles, instantly on the suggestion of given facts. A leading and indispensable method to which is, in every inquiry, whether in the reading of legal treatises, of digests, or of reported decisions, or in the investigation of questions in practice, to connect with the principles illustrative facts, and with every collection of facts the principles. Of course, in reading the present book, he will distinguish illustration from doctrine, and lay the two away in his memory accordingly. Besides, if he reads with the highest wisdom, he will not be satisfied simply with the author's illustrations, but will invent or search out others of his own. Having thus the inventive faculty constantly in exercise, and keeping fact and doctrine always in juxtaposition in his thoughts, he will be in a mental condition, if of the right sort of natural ability, to have the doctrine suggest itself whenever the facts of a case are stated.

§ 1471. These views do not constitute a very full response to the title under which they stand, or *résumé* of the volume; but they are all the author deems essential. The further review can best be accomplished by a rereading. While the law of contracts appears simple on a first approach, it is found on a nearer inspection to have been so much and so long wrought over by the hand of judicial culture that only on the minute examination of its several parts can it be properly understood.

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